(32,314)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 747

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PETITIONER,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN, AND OTHERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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United States District Court,

DISTRICT OF NEW JERSEY.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

vs.

THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, a municipal corporation, and HENRY LADEN, MILLARD LADEN, FRANCIS SCHMIDT, RUDOLPH BIESER, JOSEPH MURPHY, DANIEL MURPHY, ANSON R. DURLING, JOHN W. TOLAR, THOMAS POWERS, LEE BRACEY, ZIBA DONNELLY, JOHN H. TANNER, RICHARD T. BURTON, TIMOTHY CALLAHAN, JOSEPH GRANT, WILLIAM BRACEY, GEORGE VAN NESS, JOSEPH GREENBERG, et als.

E-#853

Docket Entries.

Oct. 30, 1924—Bill of Complaint filed.

Oct. 30, 1924—Order to Show Cause why Preliminary Injunction should not issue, filed.

Nov. 10, 1924—Order continuing hearing on Order to Show Cause, filed.

Nov. 17, 1924—Hearing on motion to Amend. Motion granted.

Nov. 17, 1924—Hearing on Order to Show Cause why Injunction should not issue. Decision reserved.

Nov. 19, 1924—Order continuing Restraint filed.

Docket Entries.

Nov. 17, 1924—Affidavits on behalf of Town of Morristown, filed.

Nov. 24, 1924—Notice of Motion to vacate Order for Injunction, filed.

Nov. 24, 1924—Hearing on motion to vacate Order of Nov. 19. Ordered that Order for Injunction be modified.

Nov. 24, 1924—Bond on restraining Order filed.

Nov. 25, 1924—Subpoena issued.

Nov. 17, 1924—Affidavits filed.

Dec. 14, 1924—Subpoena returned, service acknowledged Dec. 1, and filed.

Dec. 3, 1924—Assignment of Errors filed.

Dec. 3, 1924—Petition of Appeal and Allowance filed.

Dec. 3, 1924—Citation issued.

Dec. 8, 1924—Citation returned, service acknowledged. Copy filed.

Dec. 6, 1924—Memorandum filed.

Nov. 24, 1924—Order denying motion to vacate Order for Injunction filed.

Dec. 12, 1924—Answer of Town of Morristown, filed.

Dec. 13, 1924—Answer of Henry Laden, et al., filed.

Dec. 17, 1924—Trial before the Court.

Dec. 18, 1924—Trial before the Court adjourned to Dec. 22/24.

Dec. 22, 1924—Trial before the Court Decision reserved.

June 17, 1925—Memorandum filed.

July 2, 1925—Testimony before Court filed.

July 1, 1925—Final Decree for Injunction and Costs filed.

July 24, 1925—Testimony before Court filed.

July 24, 1925—Assignment of Errors filed.

Docket Entries.

July 24, 1925—Petition for Appeal and Allowance filed.
Aug. 13, 1925—Supercedeas Bond filed.
July 24, 1925—Citation issued.
Aug. 8, 1925—Citation returned, service acknowledged. Copy filed.
Aug. 17, 1925—Notice of filing of Appeal Bond filed.
Aug. 12, 1925—Assignment of Errors filed (Appeal of Henry Laden, et als.).
Aug. 12, 1925—Petition for Appeal filed.

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY, } ss.:

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original DOCKET ENTRIES on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this 21st day of August, nineteen hundred and twenty-five.

GEORGE T. CRANMER,
Clerk, District Court, U. S.
by R. S. CHEVRIER,
Deputy.

(Seal)

Bill of Complaint.

(Filed October 30, 1924.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation, Complainant, vs. THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, a municipal corporation, and HENRY LADEN, MILLARD LADEN, FRANCIS SCHMIDT, RUDOLPH BIESER, JOSEPH MURPHY, DANIEL MURPHY, ANSON R. DURLING, JOHN W. TOLAR, THOMAS POWERS, LEE BRACEY, ZIBA DONNELLY, JOHN H. TANNER, RICHARD T. BURTON, TIMOTHY CALLAHAN, JOSEPH GRANT, WILLIAM BRACEY, GEORGE VAN NESS, JOSEPH GREENBERG, and others, Defendants.	In Equity, No. 853. Bill of Complaint.

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEW JERSEY:

The complainant, The Delaware, Lackawanna and Western Railroad Company, presents its Bill of Complaint against the defendants, The Mayor and Board of Aldermen of the Town of Morristown,

a municipal corporation, and Henry Laden, Millard Laden, Francis Schmidt, Rudolph Bieser, Joseph Murphy, Daniel Murphy, Anson R. Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Timothy Callahan, Joseph Grant, William Bracey, George Van Ness, Joseph Greenberg, and others, and for cause of action says:

I. Complainant is a corporation duly incorporated, organized and existing under and by virtue of the Laws of the Commonwealth of Pennsylvania. It has been for many years past and is now lawfully engaged in operating a continuous line of railroad, partly by rail and partly by water, extending from points in the city of New York, State of New York, by ferries and lighters to the waterfront in Jersey City and Hoboken, in the State of New Jersey, and thence by rail through said cities, thence through the State of New Jersey, thence through the States of Pennsylvania and New York by way of Scranton, Pa., and Binghamton and Elmira, N. Y., to the city of Buffalo, in the State of New York, and in particular it lawfully operates, maintains and controls and has for many years past lawfully operated, maintained and controlled, in conjunction with said ferries between the City of Hoboken, N. J., and various points in the city of New York, State of New York, a line of railroad known as the Morris and Essex Railroad, extending from Phillipsburg, N. J., to Hoboken, N. J., by way of Washington, Denville, Morristown and Newark. For many years past it has been and now is engaged as a common carrier in transporting persons and property for hire over such system of railroad and at all such times, as such common carrier, complainant has been and now is engaged in transport-

ing persons and property for hire over continuous lines and routes in both directions between the said city of New York, in the State of New York and the city of Morristown, in the State of New Jersey, and in both directions between said city of Morristown, New Jersey, and points and places in the Dominion of Canada and in various States other than the State of New Jersey, on and by its own railroads and ferries and the railroads and steamboats of connecting common carriers under common control, management and arrangement for continuous carriage.

II. By indenture bearing date of December 10, 1868, said The Morris and Essex Railroad Company, a corporation of the State of New Jersey, lawfully granted, leased and demised all of its railroads and properties including its franchises, rights, powers and privileges unto the complainant, The Delaware, Lackawanna and Western Railroad Company for the term of the corporate existence of said lessor company, and that on or about the date of said indenture the lessee therein named entered into possession of the said railroads and property and the exercise of all and singular the franchises, rights, powers and privileges of its said lessor and has ever since continued therein.

III. The Morris and Essex Railroad Company during all the times hereinafter mentioned and for a long time prior thereto was and now is the owner of the lands and premises hereinafter particularly described and shown in yellow outline on the blueprint map hereto attached, marked Exhibit A and made part hereof, and that The Delaware, Lackawanna and Western Railroad Company as lessee of

said The Morris and Essex Railroad Company was during said times and for a long time prior thereto and now is in exclusive possession thereof.

IV. The complaint has and handles a large volume of interstate passenger traffic, being upwards of 3,000 passengers per day, by means of its said railroads and ferries between the city of New York in the state of New York, and the town of Morristown in the state of New Jersey, which interstate passenger traffic constitutes the great bulk of the complainant's passenger business moving in and out of the said town of Morristown. In order to properly handle its said interstate passenger traffic and other interstate traffic originating at and terminating at Morristown, New Jersey, and for the use and accommodation of its patrons, has constructed and now maintains at Morristown, New Jersey, on lands so owned by The Morris and Essex Railroad Company as aforesaid, a convenient commodious and artistic passenger station and appurtenances with ornate grounds and with plazas and driveways and sidewalks as approaches thereto as shown upon the said blueprint map marked Exhibit A.

V. None of the grounds, plazas, driveways or approaches shown within the yellow outline on Exhibit A hereto attached is a public street, or highway, nor has any of the aforesaid grounds, plazas, driveways or approaches, or any part of them, ever been laid out or dedicated as a public street, highway or public place.

VI. Said station, station grounds, plazas and approaches thereto were, however, constructed, laid out and established during the years 1913 and 1914

under a contract dated September 24, 1912, between The Mayor and the Board of Aldermen of the Town of Morristown, New Jersey, party of the first part, and The Morris and Essex Railroad Company, owner, and The Delaware, Lackawanna and Western Railroad Company, its lessee, parties of the second part, in and by which it was provided that said station, station grounds, plazas, driveways and sidewalks should be constructed, laid out and established substantially as they now exist and as they are shown on Exhibit A hereto attached. Said contract further provided among other things in respect of said grounds, driveways, plazas and approaches as follows, to wit:

VII.

PASSENGER STATION.

* * * * * * * *

It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

VII. That heretofore, to wit: on the 28th day of December, 1922, for the purpose of regulating the use of its said station, station grounds and approaches and foot and vehicular traffic therein and thereon and for the purpose of insuring safe, adequate, reliable and proper cab service at reasonable rates to and from its said station for such of its patrons as desired to avail themselves thereof, and

to protect its said patrons from solicitations, contentions, importunities, extortions and annoyances of cab drivers, hackmen and others who were wont to enter said premises with their taxicabs and other vehicles and congregate in large numbers upon said premises and in loud and boisterous voices and offensive manner solicit the custom and patronage of its railroad passengers, and otherwise harrass and annoy said patrons and conduct themselves in an obnoxious manner, complainant entered into a contract with Laclare L. Welsh, a resident of Morristown and an owner and operator of taxicabs, in and by which for a valuable consideration the said Railroad Company permitted and licensed said Leclare L. Welsh to have, use and occupy certain spaces on its premises in front of its passenger station at Morristown and a certain space in the rear thereof for his exclusive use as an automobile or taxicab stand and also granted to said Welsh the exclusive right of soliciting in its said station and on its said station grounds the custom or patronage of its patrons and other persons for such cab service, and the further exclusive privilege of installing and maintaining in said station building a cab stand with telephone facilities. A copy of said agreement is hereto annexed, made a part of this bill and marked Exhibit B.

VIII. Pursuant to said agreement the said Laclare L. Welsh provided safe, adequate, reliable and proper cab service for the transportation of the passengers and patrons of said Railroad Company with their baggage and conformed to the rules and regulations of the said Railroad Company and did all the things required to be done by him in and by the provisions of said contract.

IX. That no person or persons, firm or corporation other than the said Laclare L. Welsh and his employes has or has had since December 28, 1922, any right, license, or permit to maintain a cab stand or to conduct or carry on any hacking or cab business of any description on said premises of said Railroad Company or to solicit custom or patronage thereon for automobiles, taxicabs or horse drawn vehicles, or to enter or remain thereon, or to stand or park taxicabs or other motor vehicles or horse drawn vehicles thereon for such purposes.

X. On October 9, 1923, the defendant, the Mayor and Board of Aldermen of the Town of Morristown, which is a municipal body corporate of the state of New Jersey, published a certain ordinance, together with a notice of its passage on first and second reading on the 8th day of October, 1924, and of the final reading and passage of said ordinance at a meeting to be held October 22, 1924, a copy of which ordinance and notice of passage thereof is hereto annexed and marked Exhibit C. The complainant, prior to the consideration of said ordinance on final reading by the said Mayor and Board of Aldermen of the town of Morristown, objected and protested against the passage and adoption of said ordinance, a copy of which protest is hereto annexed and marked Exhibit D. Notwithstanding the said protest of your complainant, the said defendant, the Mayor and Board of Aldermen of the town of Morristown passed and adopted said ordinance on October 22, 1924, and on the publication of notice of passage of said ordinance on the 23rd day of October, 1924, it became immediately effective.

XI. On said 23rd day of October, 1924, and daily since that date, the defendants, Henry Laden, Mil-

lard Laden, Francis Schmidt, Rudolph Bieser, Joseph Murphy, Daniel Murphy, Anson R. Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Timothy Callahan, Joseph Grant, William Bracey, George Van Ness, Joseph Greenberg and others whose names complainant does not now know and has not been able to ascertain, all of whom are severally owners or operators of taxicabs and citizens of the State of New Jersey, without the consent of the complainant have repeatedly entered upon the premises of the complainant singly and in groups and congregated thereon, and noisily and boisterously solicited passengers and baggage for their vehicles, and obstructed and interfered with the passage of passengers along said station platforms and exits and continue to do so; and have entered the said premises of the complainant without its consent with twenty or more taxicabs and have stood and parked their said cabs upon the said premises of the complainant in pursuit of the purposes aforesaid and continue to do so, to the great annoyance and confusion of the complainant and its patrons, and deprived the complainant of the full, lawful and beneficial use and enjoyment of its said premises, and prevented the complainant from securing to its passengers and patrons traveling to and from New York City and Morristown and to and from Morristown from and to points in the various states free and uninterrupted passage to and from its station and to and from arriving and departing trains.

The said acts of the individual defendants, named in the foregoing paragraph, have been and are done under and pursuant to the pretended authority of

said ordinance of the town of Morristown heretofore set forth.

XII. Complainant is informed and verily believes that said persons and each of them intend to continue in the future to so enter upon said premises and to solicit passengers and baggage thereon for their vehicles, and to stand and park their vehicles thereon in pursuit of such purpose in violation of the rights of the complainant and in defiance and disregard of the objections and remonstrances of the said Railroad Company, and its express notices and directions to refrain therefrom.

XIII. The complainant avers that the passage and adoption of the said ordinance by the defendant, the Mayor and Board of Aldermen of the town of Morristown, and particularly paragraph 1 thereof, which purports to designate and establish a portion of the complainant's station grounds at Morristown, New Jersey, as a public hack stand, and particularly sections 2 and 3 of said ordinance, which purport to prohibit the automobiles of the passengers and patrons of the complainant from using any other part of the complainant's lands at said station are illegal, unconstitutional and void, in that said ordinance by its terms aforesaid constitutes and the enforcement thereof constitutes and will constitute the taking of the complainant's lands for public use without making compensation to the complainant therefor, and constitutes and the enforcement thereof constitutes and will constitute a deprivation of complainant of its lands and the use thereof without due process of law, and constitutes and the enforcement thereof constitutes and will constitute a denial to the complainant of the equal protection of the laws in the use

and enjoyment of its said property, all of which acts are in violation of the Fourteenth Amendment of the Constitution of the United States.

Said ordinance further by its terms and effect is illegal and void in that it attempts and purports to regulate the facilities of the complainant required by it in the handling and accommodation of interstate traffic, and is an unlawful interference with said interstate commerce.

Said ordinance further by its terms and effect is a violation of the rights of the complainant to regulate foot and vehicular traffic at said station, and of the right of the complainant to require the said town of Morristown to exercise its police powers for the enforcement of the rules and regulations of the complainant in respect to foot and vehicular traffic at said station.

The complainant further avers that the said ordinance was not passed and adopted by the Mayor and the Board of Aldermen of the town of Morristown in good faith for the purpose of exercising any lawful right of said municipality, but was adopted and passed in bad faith and for the purpose of harrassing and embarrassing the complainant and preventing it from establishing and enforcing its own regulations of foot and vehicular traffic and the use of its station and station grounds and for the purpose of hindering and preventing the execution and performance of the aforesaid contract made by the complainant with said Laclare L. Welsh.

Complainant further shows that the acts of said individual defendants set forth in paragraph XI of the bill of complaint constitute a constant, continuous and unlawful trespass upon the lands of the complainant and constitute the taking of the complainant's lands for public use without making any

compensation to the complainant, and constitute a deprivation of the complainant of its lands without due process of law, and constitute an unreasonable interference with the interstate commerce and traffic of the complainant.

XIV. This case involves questions arising under the Constitution and laws of the United States and the amount involved is in excess of $3,000, exclusive of interest and costs.

Complainants are without adequate remedy at law and therefore pray:

1. That defendants, The Mayor and Board of Aldermen of the Town of Morristown, Henry Laden, Millard Laden, Francis Schmidt, Rudolph Bieser, Joseph Murphy, Daniel Murphy, Joseph Greenberg, Anson R. Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Timothy Callahan, Joseph Grant, William Bracey, George Van Ness, may answer this bill of complaint without oath and our statements made therein;

2. That the defendant, The Mayor and Board of Aldermen of the Town of Morristown, its officers, servants, agents and employes, from and after the time when it shall have notice of the entry of the final decree herein, be forever restrained from enforcing said ordinance, and from assigning, allotting, designating or taking any part of the complainant's lands and premises in and about its station in said town of Morristown, for a public hack stand or as a place for the solicitation of taxicab drivers of the patronage of the complainant's pat-

rons and passengers, and further restrained from interfering with the complainant in the full and free use and control of its said station and station grounds.

3. That the said defendants, Henry Laden, Millard Laden, Francis Schmidt, Rudolph Bieser, Joseph Murphy, Daniel Murphy, Joseph Greenberg, Anson R. Durling, John W. Tolar, George Van Ness, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Timothy Callahan, Joseph Grant, William Bracey, and each of them and their and each of their agents, servants and employes and all persons claiming to act under their authority, direction or control, or any or either of them, and all other persons not named herein, and all persons aiding and abetting them, or any or either of them, from and after the time when they severally have notice of the entry of the final decree herein be forever restrained and enjoined from soliciting the custom or patronage of any person or persons whomsoever for automobiles, taxicabs or horse drawn vehicles on the lands and premises occupied by the passenger station and shelter house and appurtenances and the driveways and approaches thereto and the driveways and the plaza and grounds in front of said station and the driveway, sidewalks and plaza immediately easterly of and northerly of the westbound shelter house of said passenger station more particularly bounded and described as follows:

SITUATE lying and being in The Town of Morristown, County of Morris and State of New Jersey,

BOUNDED and described as follows:
Beginning at a point in the Northeasterly line of Morris Street and at or near the most Southwesterly corner of the Northerly abutment of the Morris and Essex Railroad bridge crossing said Morris Street and running thence

(1) along the said Northeasterly line of Morris Street North sixty degrees West (N. 60° W) for a distance of four hundred sixty (460) feet more or less to its intersection with a concrete curb running along the Northwesterly edge of a driveway; thence

(2) along said curb on a course of North thirty degrees East (N 30° E) for a distance of three hundred sixty-three (363) feet more or less to a point in range with face of the Northerly abutment of the Morris and Essex Railroad bridge located between the Passenger Depot and the Express Building of said Railroad Company; thence

(3) partly in range with and partly along said face of said abutment and on a course of North seventy-four degrees and twenty-three minutes East (N 74° 23′ E) for a distance of one hundred thirty (130) feet more or less to a point in range with the Easterly side of the Express building of said Railroad; thence

(4) Northerly parallel to the main tracks of said Railroad and partly in range with and partly along the Easterly side of said Express Building for a distance of eighty-three (83) feet more or less to a point in the line of another concrete curb; thence

(5) Easterly at right angles to the Fourth (4th) course herein and also along said last mentioned concrete curb for a distance of fifty (50) feet more or less to a point in line with another concrete curb; thence

(6) Southerly and parallel with the Fourth (4th) course herein for a distance of seventy (70) feet more or less to a point in the boundary line of lands of The Morris and Essex Railroad Company; thence

(7) Southwesterly along said boundary line for a distance of fourteen (14) feet more or less to a corner in said boundary line; thence

(8) Still along said boundary line and over a course of South fifty-nine degrees and forty-nine minutes East (S 59° 49′ E) for a distance of one hundred eighty-one (181) feet more or less to an iron monument at another corner in said boundary line, a part of this Eighth (8th) course being marked by a stone curb; thence

(9) Still along said boundary line and on a course of South sixteen degrees and eighteen minutes West (S 16° 18′ W) for a distance of two hundred thirty-seven (237) feet more or less to another iron monument at another corner in said boundary line; thence

(10) Still along said boundary line and on a course of South thirty-two degrees and fourteen minutes West (32° 14′ W) for a distance of one hundred three (103) feet more or less to a point on another concrete curb; thence

(11) Still along said boundary line and along said last mentioned curb and on a course

of South four degrees and fourteen minutes West (S 4° 14′ W) for a distance of seven (7) feet to a point distant Easterly (measured radially) twenty-three and five tenths (23.5) feet from the center line between the main tracks of said Railraod; thence

(12) Southerly still along said boundary line and curb on a curve concentric with and distant Easterly twenty-three and five tenths (23.5) feet from said center line for a distance of one hundred eighty-one (181) feet more or less to a point in range with the face of the Northerly abutment of the Morris and Essex Railroad bridge crossing Morris Street; thence

(13) Partly in range with and partly along the face of said last mentioned abutment and on a course of South sixty-seven degrees and forty-three minutes West (S 67° 43′ W) for a distance of forty-five (45) feet more or less to the point of beginning.

CONTAINING four (4) acres of land be the same more or less.

and be forever restrained and enjoined from entering upon said premises or any part thereof for the purpose of soliciting the custom and patronage of any person or persons whomsoever, for automobiles, taxicabs or horsedrawn vehicles, and from standing or parking their vehicles on said station grounds in pursuit or furtherance of said purpose and from in any manner plying their respective vocations of cabmen, hackmen or expressmen thereon in such manner as to interfere with the rights and privileges of complainant and its rights and advan-

tages under its contract with said Laclare L. Welsh to conduct and carry on the automobile and taxicab business on said premises.

4. That meanwhile a preliminary injuntion issue herein likewise restraining and enjoining said defendants during the pendency of these proceedings and until the final determination thereof, and that complainants may have such other and further relief in the premises as the nature and circumstances of the case may require and as may seem meet and agreeable to equity and good conscience.

5. That not only a writ of injunction directed to said defendants may issue out of this Court, but also writs of subpoena commanding defendants and each of them to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
By JOHN G. ENDERLIN,
Assistant Secretary and
Assistant Treasurer.

MAXIMILIAN M. STALLMAN,
Solicitor of Complainant.

JOHN L. SEAGER,
Of Counsel with Complainant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN G. ENDERLIN, being duly sworn, on oath says that he is Assistant Secretary and Assistant Treasurer of complainant and as such is authorized to make this affidavit in its behalf; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true in substance and fact.

JOHN G. ENDERLIN.

Subscribed and sworn to before me }
this 29th day of October, 1924. }

JOSEPH FIELL,
Notary Public, No. 45,
County of New York.
[L. S.]
Commission expires 3/30/25.

Exhibit B.

(Same as Ex. C. 16.)

THIS AGREEMENT, made this 28th day of December, in the year of our Lord, One Thousand Nine-Hundred and twenty-two, between THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation existing under the laws of the State of Pennsylvania, hereinafter called the Railroad Company, party of the first part, and LACLARE L. WELSH, party of the second part.

WHEREAS, the Railroad Company is desirous of establishing an adequate and efficient cab service for the accommodation of its patrons with their accompanying baggage at Morristown, in the County of Morris, State of New Jersey, and to regulate the said service and the solicitation of business in its station and upon its station grounds, and to regulate the parking of cabs and other vehicles upon said grounds, and the said Laclare L. Welsh being willing to undertake to furnish service of that character upon the terms and conditions hereinafter set forth:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That in consideration of the premises and the covenants and undertakings hereinafter contained on the part of the respective parties hereto to be kept, observed and performed, it is hereby covenanted, stipulated and agreed by and between the parties hereto as follows:

I. The Railroad Company does hereby grant to the said Laclare L. Welsh during the term of this agreement:

Exhibit B.

(1) The exclusive right to solicit business as a cabman in the station and on the station grounds of the Railroad Company at Morristown, New Jersey.

(2) The privilege, to the exclusion of all other cabmen or cab companies, of installing and maintaining in said station building a cab stand with telephone facilities, subject, however, to the direction and approval of the General Manager of the Railroad Company and without expense to it.

(3) The exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blueprint map hereto attached.

II. Laclare L. Welsh hereby agrees to furnish and operate for the convenience of the patrons of the Railroad Company at Morristown, New Jersey, motor driven vehicles in such numbers, design and such equipment in the way of taximeters and other automatic devices, and with such drivers as shall be approved by the General Manager of the Railroad Company. He further agrees that the entire equipment shall be uniform and attractive in appearance.

III. Laclare L. Welsh does hereby agree that such service shall receive at all times his personal attention and that it shall be maintained at the highest standard of efficiency and that he will endeavor in all reasonable ways to avoid all causes for complaint in connection with such operation and that such service shall at all times be prompt, regular and reliable and shall be conducted in all respects in a manner satisfactory to the General

Manager of the Railroad Company. He does further agree that his employes while on the premises of the Railroad Company shall at all times conform to its general rules and regulations and any further rules or regulations which may be prescribed by the General Manager of the Railroad Company and in case any of such employes shall for any reason be or become objectionable to the General Manager of the Railroad Company, he shall be removed on written request of such General Manager.

IV. Laclare L. Welsh hereby covenants and agrees that he will assume any and all liability for any and all injuries, loss or damage that may arise out of or result from the operation of said cab service or from the presence of his employes or vehicles upon the premises of the Railroad Company, either to his own person or property, or to the person or property of any persons in his charge, to passengers or employes of the Railroad Company, or to others lawfully in or upon the premises of the Railroad Company, or to their property, or to the property of the Railroad Company, or any property in its charge, and will save harmless and indemnify the Railroad Company from and against all claims, demands and actions that may be presented or instituted against it and from and against all costs, loss or expenses that may be incurred by it by reason of such injuries, loss or damage and will also indemnify and save harmless the Railroad Company against any and all claims and suits which may be made or brought against it for injury, although it may result in death, or for damage or loss sustained by any of the employes of

Exhibit B.

Laclare L. Welsh, whether the same may occur through the negligence of the Railroad Company, its employees, or otherwise.

V. Laclare L. Welsh hereby agrees that the rates which shall be charged for the services herein provided for shall be as follows; provided, however, that such rates shall in no wise exceed the rates now or hereafter prescribed by municipal ordinance:

Schedule of Rates.

For not more than one passenger in Town limits ..... 35¢
For each additional passenger, over one, in town limits ..... .15¢
For the first one-third mile, or any fraction thereof, outside of Town limits ..... 25¢
For each succeeding one-third mile, or any fraction thereof, outside of Town limits ..... 10¢
For each four minutes' waiting ..... 10¢
For each package or piece of baggage carried outside ..... 20¢

A schedule of such rates shall be placed in a conspicuous place in each of the vehicles employed in the service herein provided for for the information of the travelling public, which rates shall not be changed without the written approval of the General Manager of the Railroad Company.

VI. Laclare L. Welsh agrees to pay to the Railroad Company as compensation for the privileges herein granted, a sum equal to ten per centum upon the gross receipts from all business to and from the said Morristown Station, payments to be made

monthly on or before the 15th day of each month on all amounts accruing during the preceding month, and the said Laclare L. Welsh does hereby covenant and agree to well and truly render to the Railroad Company monthly, not later than the 10th day of each month, a statement of the vehicles in service during each day of the preceding month and the daily gross receipts from each of such vehicles during such month and to permit the authorized representatives of the Railroad Company to have access to his books, accounts and records in order to verify the accuracy of all such statements

VII. Leclare L. Welsh hereby covenants and agrees that he will not assign this contract or any part thereof without the written consent of the Railroad Company.

VIII. This agreement shall take effect upon the day of the execution thereof and shall continue in force until such time as either party hereto shall give to the other ninety days' written notice of intention to terminate the agreement, whereupon at the expiration of said ninety days this agreement shall terminate; provided, however, that upon failure of said Leclare L. Welsh to keep and perform any of the covenants herein contained on his part to be kept and performed, the Railroad Company, or its successors or assigns, shall have the right to terminate this agreement upon thirty days' written notice to the said Leclare L. Welsh.

IX. This agreement shall not be so construed as to prevent persons or corporation from entering upon the premises of the Railroad Company for the

purpose of removing baggage or other property from its said station or grounds under contracts heretofore made or which may be hereafter made with the said Railroad Company.

X. All differences and disputes arising between the Railroad Company and Leclare L. Welsh in connection with this agreement shall be submitted to the General Manager of the Railroad Company and his decision shall be final, conclusive and binding upon each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed the day and year first above written.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
By R. M. WHITE, Supt.
LACLARE L. WELSH.

Form Approved
W. S. JENNEY,
General Counsel.

A. E. DEMOTT,
Witness.

Exhibit C.

(Same as Ex. C 20 and Ex. D 6.)

An Ordinance relating to traffic on the drive way lying on the East side of the Lackawanna depot in the town of Morristown, establishing additional hackstand and regulating parking and hacking.

WHEREAS, this governing body has received petitions from over three hundred commuters and patrons of the Delaware, Lackawanna & Western Railroad, asking that the public hack stand for West bound trains be restored to its former place where it stood for so many years; and it appearing from said petitions and from the report of the Police Committee upon the same that the present stand is inconvenient and in rainy inclement weather adds greatly to the discomfort of, and in the opinion of the Committee constitutes a menace to the health and safety of the traveling public, and particularly so in winter weather, and that numerous complaints other than the said petitions have been received by the Committee from the traveling public, of the inconvenience and discomfort by reason of the present arrangement and the Committee, after an investigation and study of the conditions during the past twenty months, recommending as a matter of better traffic regulation and in order to prevent inconvenience and discomfort to the traveling public and to protect their health and safety, that the said change be made; and this governing body concurring in the recommendations of the Committee and being of the opinion that a change should be made establishing said hack stand at its said former place and making other changes in the traffic regulations at the station; and

Exhibit C.

WHEREAS, it has been established by the judgment of the highest court in this state that the Town under its general police power and also by virtue of its agreement with the railroad company has jurisdiction in the premises;

THEREFORE, BE IT ORDAINED by the Mayor and Board of Aldermen of the Town of Morristown being the governing body of said Town, as follows:

1. That part of the westerly side of the driveway on the East side of the shelter house of the Delaware, Lackawanna & Western Railroad in Morristown, extending from the northerly side of the entrance way to the shelter house or tunnel under the depot northerly along the curb to the turn of said driveway under the railroad is hereby designated and established as an additional public hack stand.

2. No automobile or other vehicle either private or that which may be engaged in the transportation of passengers for hire, shall be parked or allowed to stand for a longer period than is necessary to take on and let off passengers, expressage or baggage on that part of said westerly side of said driveway extending from the said northerly side of said entrance way southerly to Lackawanna Place.

3. No automobile or other vehicle which may be engaged in the transportation of passengers for hire shall be parked or allowed to stand along the curb or enclosed part of the easterly side of said driveway.

4. No owner or driver of any automobile or other vehicle engaged in the transportation of passengers

Exhibit C.

for hire, whether licensed under any ordinance of the Town or not, shall stand the same while awaiting employment, at any railroad station or any place of public assemblage or entertainment in the Town of Morristown, or at or in any street or driveway in said Town, except in such places as are or shall be designated as hack stands by the Mayor and Board of Aldermen, nor shall the owner or driver of such vehicle awaiting employment at any designated stand leave the said vehicle, nor shall he move the same from the designated stand to take a passenger or passengers until summoned therefor, either by said passenger or passengers or by an officer of the Town charged with that duty, nor shall he solicit custom for any such vehicle awaiting employment when away or off from said hack stand. No owner or driver of any such vehicle while awaiting employment or otherwise, shall solicit custom in any noisy, persistent or offensive manner, nor use indecent or profane language, nor be guilty of boisterous talking or shouting or any disorderly conduct; nor vex or annoy travellers or citizens, nor at any time employ or permit any other person to ask or solicit said custom." No owner or driver of any such licensed vehicle, the same being disengaged, shall refuse to carry any orderly person and his baggage, as designated in any ordinance, to any place in the Town of Morristown, nor extort or demand any sum for so doing other than he is entitled to receive under said ordinance, and every owner and driver, on being engaged, shall display in a conspicuous place on his said licensed vehicle a placard bearing the word "Engaged"; such placards to be furnished by the Town Clerk. Any such licensed vehicle without such placard being thus displayed shall be taken and construed as being disengaged.

Exhibit C.

5. Any person violating any of the terms of this ordinance shall be liable, for each and every violation, upon conviction, to a fine of not exceeding fifty dollars or confinement in the county jail for not exceeding five days, in the discretion of the magistrate imposing the same.

6. All ordinances and parts of ordinances inconsistent with this ordinance are hereby repealed.

NOTICE.

NOTICE is hereby given that the foregoing ordinance was introduced at an adjourned meeting of the Mayor and Board of Aldermen of the Town of Morristown, held October 8, 1924, and that it was then and there read for its first and second reading; and that the said ordinance will come up for final reading and passage at a meeting of the said Mayor and Board of Aldermen to be held October 22, 1924, at 8 P. M., at the Boards Rooms in the Municipal Building, Morristown, N. J.

All persons having any interest in the passage of said ordinance or in the lands affected thereby, or who are interested therein, are hereby notified to appear before said meeting, where they may discuss the same and make such objections or suggestions as they may desire.

Dated, October 9, 1924.

N. C. TOMS,
Town Clerk.

Exhibit D.

(Same as Exhibit C. 25)

TO THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN.

GENTLEMEN: Referring to your notice of the final reading of an ordinance entitled "An ordinance relating to traffic on the driveway lying on the east side of the Lackawanna depot in the town of Morristown, establishing additional hack stands and regulating parking for hacking," to be considered at a meeting of the Mayor and Board of Aldermen of the town of Morristown on October 22, 1924.

The Delaware, Lackawanna & Western Railroad Company on behalf of itself and its lessor, the Morris and Essex Railroad Company, objects and protests against the passage of said ordinance, and particularly against Sections 1, 2 and 3 of said ordinance, on the grounds that the lands upon which are located the driveways mentioned in the ordinance, and upon which it is proposed to establish said hack stands, are owned in fee by the Morris and Essex Railroad Company, and in the exclusive possession and use of the Delaware, Lackawanna & Western Railroad Company as lessee thereof. That the said Morris and Essex Railroad Company and the Delaware, Lackawanna & Western Railroad Company, its lessee, has not consented and does not consent to the establishment of a public hack stand upon its property, or to any regulation of its property or interference on the part of the town of Morristown with the exculsive control and regulation of said premises by the Delaware, Lackawanna & Western Railroad Company.

We further object to the passage of said ordinance upon the ground that the attempted establishment of a public hack stand upon said lands of

said railroad company or the attempted exercise by the Town of Morristown of an alleged right to regulate the said premises of the railroad company, or to interfere with the full and free use and control of said premises by the said railroad company, is in violation of the rights of the said railroad company and its lessor under the constitution of the state of New Jersey and under the constitution of the United States, in that the effect of said ordinance and the execution of the provisions thereof would constitute the taking of the lands of said railroad company for public use without making compensation, and would constitute the taking of the lands and property of said railroad company without due process of law, and would be a denial of the rights of the said railroad companies to the equal protection of the laws, and

Further, that the passage of said ordinance will constitute a violation, and an impairment of the contractual obligations of the Town of Morristown, as expressed in a certain contract dated September 24, 1912, between the Mayor and The Board of Aldermen of the town of Morristown, New Jersey, party of the first part, and the Morris and Essex Railroad Company, owner, and the Delaware, Lackawanna & Western Railroad Company, its lessee, parties of the second part, in which the said town of Morristown covenanted and agreed to exercise its police powers in and upon the station grounds and driveways at said Morristown station for the enforcement of the rules and regulations of the railroad companies in respect to foot and vehicular traffic at said station.

DELAWARE, LACKAWANA & WESTERN
RAILROAD COMPANY,
By CONGLETON, STALLMAN & HOOVER,
Its Attorneys.

Answer for Defendant Town of Morristown.

(Filed Dec. 12, 1924)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Between THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant, and THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*, Defendants.	On Appeal

The Defendant, Town of Morristown, incorrectly named in the Bill of Complaint as the Mayor and Board of Aldermen of the Town of Morristown, a municipal corporation, in answer to the Bill of Complaint of the Complainant, Delaware, Lackawanna & Western Railroad Company, says that:

1. It admits paragraph one of the Complaint.

2. It is without knowledge of the matters set forth in paragraph two of the Bill of Complaint.

3. It is without knowledge as to whether the Morris & Essex Railroad Company during all the times mentioned in the Bill of Complaint and for a long time prior thereto, was and now is the owner of the land and premises described and shown in yellow outline on the blue print map at-

tached to the Bill of Complaint as Exhibit A, and it denies that the complainant as lessee of the said Morris & Essex Railroad Company was during said times and for a long time prior thereto, and now is, or has been in exclusive possession thereof.

4. It admits that the Complainant has constructed and now maintains in Morristown, New Jersey, a passenger station with grounds and plazas, and driveways and sidewalks as approaches thereto, and except as herein admitted it is without knowledge as to the other matters set forth in the fourth paragraph of the Bill of Complaint.

5. It denies the matters set forth in the fifth paragraph of the Complaint.

6. It admits that the contract was entered into on September 24, 1912 as stated in the sixth paragraph of the Bill of Complaint, and that the said station, station grounds, plazas and approaches thereto were laid out and constructed in accordance therewith, and it requires the production of the said contract as to the terms and conditions thereof, and the provisions therein contained.

7. It is without knowledge of the matters set forth in the seventh paragraph of the Bill of Complaint and says that if any such contract was made as stated therein, it was not made for the reasonable purpose alleged in said paragraph, but solely for the purpose of securing financial return and remuneration to the complainant, and it denies that any such contract, if made, is legal or valid as against this defendant.

8. It denies the matters set forth in the eighth paragraph of the Bill of Complaint.

9. It denies the matters set forth in the ninth paragraph of the Bill of Complaint.

10. It admits the tenth paragraph of the Bill of Complaint.

11. It denies the eleventh paragraph of the Bill of Complaint.

12. It is without knowledge as to the matters set forth in the 12th paragraph of the Bill of Complaint.

13. It denies the thirteenth paragraph of the Bill of Complaint.

14. It denies the fourteenth paragraph of the Bill of Complaint.

15. Further answering the Bill of Complaint, this defendant says: On September 24, 1912, a contract was entered into between the Mayor and Board of Aldermen of the Town of Morristown and the Essex Railroad Company and The Delaware, Lackawanna and Western Railroad Company, as referred to in paragraph VI of the Bill. In and by said agreement the said complainant, The Delaware, Lackawanna and Western Railroad Company agreed to and afterwards did dedicate to the Town of Morristown from its land such land as was necessary for the new street now known as Lackawanna Place, and did provide all lands necessary for the laying out and establishing of a drive-

way on said Station grounds connecting with and continuing said Lackawanna Place, and further agreed that the driveway extending northerly at right angles from Morris Street, under the Railroad Company's tracks, and along the easterly side of the said tracks, should be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the Station grounds on the easterly side of said Railroad, and in addition thereto further agreed as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

16. Further answering the Bill of Complaint, this defendant says that ever since the completion of said improvement mentioned in said agreement of September 24, 1912 the Town of Morristown has exercised police powers in and upon said station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic; that it did shortly after the completion of said improvement by its then Mayor, John Todd, Esq., and pursuant to the authority of ordinances of the said Town, designate public hack stands on said station grounds, and did set up traffic signs for the direction of traffic, and did enforce its regulations with respect to the location of public hack stands and also with respect to the traffic, both foot and vehicular, on said station grounds, approaches

and driveways, and that said regulation and exercise of authority by said Town has continued until after the making of the said contract with the said Laclare L. Welsh, dated December 28, 1922.

17. Further answering the Bill of Complaint this defendant says that prior to the passage and adoption of the said ordinance (Exhibit C to the Bill of Complaint) it was petitioned by 314 citizens of the Town, who are patrons of, and commuters on, the Railroad trains of the complainant, requesting that the cab stand which had previously been designated and used on said station grounds along the Easterly elevation wall from the time of the completion of the improvement until shortly after the making of the said contract between the complainant and Welsh, dated December 28, 1922, be restored; and that the police committee of the Board of Aldermen of this defendant, after many months of study and investigation of the traffic conditions at the said station plaza, and after listening to and considering many complaints from patrons of the complainant's trains because of the then existing traffic conditions, was of the opinion and reported that the said hackstands should be restored, and thereupon this defendant, in good faith and for the purpose of regulating the foot and vehicular traffic in the said driveway to the best interests of the travelling public and of the public welfare, adopted the said ordinance.

18. Further answering the Bill of Complaint, this defendant says that the use and occupation of the said station grounds by the complainants is subject to the right of the said Town of Morristown and its lawfully constituted authorities, to

exercise all necessary police powers thereon, for the purpose of regulating foot and vehicular traffic at said station.

19. Further answering the Bill of Complaint this defendant says that it claims and has always claimed the right to exercise all necessary police powers including the regulation of foot and vehicular traffic on said station grounds because said station grounds constitute a public place within the limits of said Town.

20. Further answering the Bill of Complaint this defendant says that it claims and has always claimed the right to exercise all necessary police powers including the regulation of foot and vehicular traffic and the establishment of removal hackstands on the said driveway mentioned in the said ordinance (Exhibit C to the Bill) because said driveway is devoted to a public use and is subject to public regulation in the interests of the public welfare under the authority vested in this defendant as a municipal corporation.

21. Further answering the Bill of Complaint this defendant says that the said Bill of Complaint is defective for want of parties in that Laclare L. Welsh is a necessary party complainant.

22. Further answering the Bill if Complaint this fendant says that the said Bill of Complaint is defective for want of parties in that Morris and Essex Railroad Company, a corporation, is a necessary party complainant.

N. C. Toms,

Solicitor of Defendant, Town of Morristown.

Conover English,

Of Counsel.

Answer of Defendants, Henry Laden, *et al.*, Cab Men.

(Filed Dec. 13, 1924.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Between
THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,
Complainant,

and

THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*,
Defendants.

} On Appeal

The defendants, Henry Laden, Millard Laden, Francis Schmidt, Rudolph Beiser, Joseph Murphy, Daniel Murphy, Anson R. Durling, John W. Toler, Thomas Powers, Lee Bracey, Ziba, Donnelly, John H. Tanner, Richard T. Burton, Joseph Grant, William Bracey, George Van Ness and Joseph Greenberg, in answer to the Bill of Complaint of the Complainant, Delaware, Lackawanna & Western Railroad Company say that:

1. They admit paragraph one of the complaint.

2. They are without knowledge of the matters set forth in paragraph two of the Bill of Complaint.

3. They are without knowledge as to whether the Morris & Essex Railroad Company during all the times mentioned in the Bill of Complaint and

for a long time prior thereto, was and now is the owner of the land and premises described and shown in yellow outline on the blue print map attached to the Bill of Complaint as Exhibit A, and they deny that the complainant as lessee of the said Morris & Essex Railroad Company was during said times and for a long time prior thereto, and now is, or has been in exclusive possession thereof.

4. They admit that the complainant has constructed and now maintains in Morristown, New Jersey, a passenger station with grounds and plazas and driveways and sidewalks as approaches thereto, and except as herein admitted they are without knowledge as to the other matters set forth in the fourth paragraph of the Bill of Complaint.

5. They deny the matters set forth in the fifth paragraph of the complaint.

6. They admit that the contract was entered into on September 24, 1912, as stated in the sixth paragraph of the Bill of Complaint, and that the said station, station grounds, plazas and approaches thereto were laid out and constructed in accordance therewith, and they require the production of the said contract as to the terms and conditions thereof, and the provisions therein contained.

7. They are without knowledge of the matters set forth in the seventh paragraph of the Bill of Complaint and say that if any such contract was made as stated therein, it was not made for the reasonable purpose alleged in said paragraph, but solely for the purpose of securing financial return

and remuneration to the complainant, and they deny that any such contract, if made, is legal or valid as against these defendants.

8. They deny the matters set forth in the eighth paragraph of the Bill of Complaint.

9. They deny the matters set forth in the ninth paragraph of the Bill of Complaint.

10. They admit the tenth paragraph of the Bill of Complaint.

11. They deny the eleventh paragraph of the Bill of Complaint.

12. They are without knowledge as to the matter set forth in the 12th paragraph of the Bill of Complaint.

13. They deny the thirteenth paragraph of the Bill of Complaint.

14. They deny the fourteenth paragraph of the Bill of Complaint.

15. Further answering the Bill of Complaint, these defendants say: On September 24, 1912, a contract was entered into between the Mayor and Board of Aldermen of the Town of Morristown and Delaware, Lackawanna and Western Railroad Company, as referred to in paragraph six of the bill. In and by said agreement the said complainant, the Delaware, Lackawanna & Western Railroad Company agreed to and afterwards did dedicate to the

Town of Morristown such land as was necessary for the new street now known as Lackawanna Place, and did provide all lands necessary for the laying out and establishing a driveway on the said station grounds connecting with and continuing said Lackawanna Place, and further agreed that the driveway extending northerly at right angles with Morris Street, under the Railroad Company's tracks, and along the easterly side of the said tracks, should be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles, and general vehicular traffic to and from the station grounds on the easterly side of said Railroad, and in addition thereto further agreed as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches, and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railway Companies in respect thereto."

16. Further answering the Bill of Complaint, these defendants say that ever since the completion of said improvement mentioned in said agreement of September 24, 1912, the Town of Morristown has exercised police powers, in and upon said station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic; that it did shortly after the completion of said improvement by its then Mayor, John Todd, Esq., and pursuant to the authority of ordinances of the said Town, designate public hack stands on said

station grounds, and did set up traffic signs for the direction of traffic, and did enforce its regulations with respect to the location of public hack stands and also with respect to the traffic, both foot and vehicular, on said station grounds, approaches and driveways, and that said regulation and exercise of authority by said Town has continued until after the making of the said contract with the said Laclare L. Welsh, dated September 28, 1922.

17. Further answering the Bill of Complaint, these defendants say that prior to the passage and adoption of the said ordinance (Exhibit C to the Bill of Complaint) the Town of Morristown was petitioned by 314 citizens of the Town, who are patrons of, and commuters on, the Railroad trains of the complainant, requesting that the cab stand which had previously been designated and used on said station grounds along the easterly elevation wall from the time of the completion of the improvement until shortly after the making of the said contract between the complainant and Welsh dated December 28th, 1922, be restored; and that the police committee of the Board of Aldermen of the Town of Morristown, after many months of study and investigation of the traffic conditions of the said station plaza and after listening to and considering many complaints from patrons of the complainant's trains because of the then existing traffic conditions, was of the opinion and reported that the said hackstand should be restored, and thereupon the Town of Morristown in good faith and for the purpose of regulating the foot and vehicular traffic in the said driveway to the best interest of the travelling public and of the public welfare, adopted the said ordinance.

Answer of Defendants, Henry Laden, et al., Cab Men.

18. Further answering the Bill of Complaint, these defendants say that the use and occupation of the said station grounds by the complainants is subject to the right of the said Town of Morristown and its lawfully constituted authorities, to exercise all necessary police powers thereon, for the purpose of regulating foot and vehicular traffic at said station.

19. Further answering the Bill of Complaint, these defendants say that the Town of Morristown claims and has always claimed the right to exercise all necessary police powers including the regulation of foot and vehicular traffic on said station grounds because said station grounds constitute a public place within the limits of said Town.

20. Further answering the Bill of Complaint, these defendants say that the Town of Morristown claims and has always claimed the right to exercise all necessary police powers including the regulation of foot and vehicular traffic and the establishment or removal of hackstands on the said driveway mentioned in the said ordinance (Exhibit C to the bill) because said driveway is devoted to a public use and is subject to public regulation in the interests of the public welfare under the authority vested in the Town of Morristown as a municipal corporation.

21. Further answering the Bill of Complaint, these defendants say that the said Bill of Complaint is defective for want of parties in that Laclare L. Welsh is a necessary party complainant.

Answer of Defendants, Henry Laden, et al., Cab Men.

22. Further answering the Bill of Complaint, these defendants say that the said Bill of Complaint is defective for want of parties in that Morris and Essex Railroad Company, a corporation, is a necessary party complainant.

JAMES H. BOLITHO,
Solicitor of defendants,
Henry Laden, et als., cab men.

JAMES H. BOLITHO,
Of Counsel.

Memorandum.
(Filed Dec. 6, 1924)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant, and THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*, Defendants.	On Bill, etc.

MAXIMILLIAN M. STALLMAN, Esq., for Complainant.

N. C. TOMS, Esq. and CONOVER ENGLISH, Esq., for the Town of Morristown.

JAMES H. BOLITHO, Esq., for defendant taxicab drivers.

BODINE, District Judge.

This is an application for a preliminary injunction. At the outset three motions were made to dismiss the bill. First, on the ground that the proper corporate title of the defendant was the Town of Morristown. The corporation having been served with process and having appeared, an amendment was permitted to cure this defect. Secondly, that the Morris & Essex Railroad Company was the owner in fee of the lands in question, and that the Delaware, Lackawanna & Western Railroad Com-

pany was merely the lessee during the corporate life of the Morris & Essex Railroad Company; and that, therefore, the Morris & Essex Railroad Company was a necessary party complainant. A lessee in possession may maintain an action in trespass. *38 Cyc 1004.* So a bill to restrain a continuing trespass would seem to lie at the suit of a lessee in possession. *22 Cyc 825.* It was thirdly moved that since the complainant had contracted with a taxicab owner for an exclusive privilege of serving the patrons of its road, that the persons with whom it had made the contract was a necessary party complainant. This motion was denied, there being nothing to show that the taxicab owner had any possessive right to the lands in question.

Coming to the merits, the bill shows that the complainant, the Delaware, Lackawanna & Western Railroad Company, hereinafter called the Lackawanna Railroad, is a Pennsylvania corporation engaged in the business of a common carrier in interstate commerce; it maintains a railroad station in the town of Morristown, New Jersey; its railroad station, station grounds, plaza and approaches were laid out and constructed during the year 1913 and 1914, under a contract between the town of Morristown and the Railroad Company. Section 7 of the contract, so far as pertinent, provides as follows: The italics are mine.

"VII

Passenger Station.

* * * * * *

It is further agreed that *the Town* may and *shall exercise* all necessary police *powers* in and upon the station, station grounds, approaches and driveways, *for* the purpose of

Memorandum.

regulating foot and vehicular *traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.*

The Railroad Company for the purpose of regulating the use of its station, station grounds and approaches and for the purpose of insuring safe, adequate and reliable cab service at a reasonable rate to and from its station for the use of its patrons entered into a contract with one LaClare Welsh, an owner and operator of taxicabs, by which contract Welsh was licensed to use and occupy certain spaces on its premises as a taxicab station and was granted the exclusive privilege of soliciting patrons in said station grounds. Welsh established a cab service and conformed with the rules and regulations of the Railroad Company.

On October 23, 1924, an Ordinance of the Town of Morristown became effective *whereby a public taxicab stand was established in the complainant's station grounds.* The bill prays for an injunction to restrain certain named defendants from occupying said alleged public taxicab stand and restraining the town of Morristown and its officers, servants, agents and employees from enforcing the said Ordinance.

The contract between the Lackawanna Railroad and the Town of Morristown, provided with respect to the land of the Railroad Company where the alleged cab stand has been established, as follows: The italics are mine.

"The Railroad Companies shall provide all *lands necessary for* the laying out and establishing *said driveway. Said driveway shall be*

Memorandum.

kept open at all times for *passengers, pedestrians,* carriages, wagons, automobiles, and *general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for* the use of *those now having rights of egress to Morris Street in Saw Mill Lane;* but *this contract shall not be construed as a dedication of* said driveway as a public highway."

The provisions of the contract above quoted have been before the New Jersey Supreme Court in Welsh v. Morristown, *98 N. J. L. 630.* This case was affirmed by the Court of Errors and Appeals. The construction adopted by the New Jersey court, as to the first above quoted section of the contract, is as follows:

"In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveway is to be regulated by the town."

This construction disregards the language of the contract that the town is to enforce the rules and regulations of the Railroad and hence is not persuasive in this court. The state court seems to have overlooked the meaning of the two provisions of the contract, above referred to, by which the use of the driveway in question is limited to *business visitors* to the station of the railroad company, *and those* of the public having *rights of egress* to Morris Street in Saw Mill Lane and granting powers to the town to regulate traffic on the Railroad property for the limited purpose of enforcing the rules and regulations of the Railroad Company where such regulations are made.

Memorandum.

Instead of construing the contract as it is written, the court sought to create something analogous to a public highway out of a *private way to the railroad company station,* and having regarded the way as something that it was not they gave to the town powers over a private way not associated with the language of the grant.

The dissent of Mr. Justice Katzenbach and Judge Clark in the Court of Appeals, if more be needed, clearly indicates that the majority opinion affirming the decision of the Supreme Court is not the law of the state. Judge George Gray says, in the Circuit Court of Appeals for the Third Circuit, in Snare & Triest Co. v. Friedman, 169 Fed., page 1 at page 11:

> "As to the constitutional and statute law of a state, and the construction given thereto by the highest state tribunals, there is little or no difficulty. And as to what the common law of a state may be, the best evidence is generally found in the settled line of decision of the state court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the state, but common to all states and countries where what is known as the 'common law' prevails. On these questions, the courts of the United States do not hold themselves bound by the decisions of the courts of the state, unless, perchance—such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that state. In deciding what the common law

of a state may be, they will resort to the same sources of information as are open to the state courts, and find the evidence of the law where the state courts must seek it, in that general jurisprudence of which we have spoken. State courts are accustomed, in discussing such questions, to refer, not only to decisions of their own states, but to those of other states in this country, as well as to decisions in that country from which we originally derived the common law. The Circuit Courts of the United States may, therefore, in forming their independent judgment, in questions where the common law of the state is derived from the principles of general jurisprudence common to all the states, at times feel compelled to differ from the conclusions arrived at by the state court. In other words, they may differ from a state court in determining what the common law of the state, thus derived, and applicable to the given case, may be. Swift v. Tyson, 16 Pet. 1, 8, 10 L. Ed. 865.

It is to be remembered, however, that this diversity of opinion will not be indulged in by the courts of the United States, where, as we have just said, in the ordinary administration of the law by the state courts, and by the settled course of their decisions, certain rules are established which have become rules of property and conduct in the state, and have all the effect of law, which it would be wrong to disturb. Burgess v. Saligman, 107 U. S. 20, 37, 2 Sup. Ct. 10, 27 L. Ed. 359; Bucher v. Cheshire R. R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Etheridge v. Sperry, 139 U. S. 267, 275, 11 Sup. Ct. 563, 35 L. Ed. 171."

Memorandum.

The construction adopted by the state court of the contract in question is so obviously not in accord with the common law of New Jersey that this court cannot hold itself bound by any such decision, and being possessed of concurrent jurisdiction is obliged to exercise an independent judgment.

This court has power to restrain cabmen from going upon the lands of the Lackawanna Railroad Company for the purpose of conducting their business Donovan v. Pennsylvania R. R. Co., 199 U. S. 279.

This court can restrain the town of Morristown from enforcing an Ordinance which will deprive the Railroad Company of its private property.

> "Its property (the Railroad's) is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation. In Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, the court considered the nature of the interest which a railroad company had in its right of way. It was there said: 'A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given.'" Donovan v. Pennsylvania R. R. Co., supra.

Memorandum.

The cabmen, defendants in this suit, deny by affidavit that they have gone upon the railroad's land. If this be so, an injunction can do no harm. As to the Town of Morristown, the establishing of a public hack stand upon the railroad company's private property would deprive the Railroad Company of its property without any process of law at all. The Ordinance was adopted less than a month ago. No property rights seem to have intervened which make it inexpedient to grant a preliminary injunction now. The cause may be speeded, if by any chance the defendants so desire.

Let a preliminary injunction now issue.

Memorandum.

(Filed June 17, 1925.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant, and THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*, Defendants.	On Bill, etc.

MAXIMILLIAN M. STALLMAN, Esq., for Complainants.

N. C. TOMS, Esq., and CONOVER ENGLISH, Esq., for the Town of Morristown.

JAMES N. BOLITHO, Esq., for defendant taxicab drivers.

BODINE, District Judge.

The preliminary injunction heretofore issued in accordance with the Memorandum filed December 6, 1924, may be final.

Final Decree.

(Filed July 1, 1925.)

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant, and THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*, Defendants.	On Bill for Injunction.

This cause came on to be heard on the 17th and 18th day of December, 1924, upon proof and argument of counsel, and the Court having considered the same.

It is ORDERED, ADJUDGED and DECREED that a certain ordinance passed and adopted by the Mayor and Board of Aldermen of the Town of Morristown, a municipal corporation in the County of Morris, State of New Jersey, approved October 22, 1924, entitled "An Ordinance relating to traffic on the driveway lying on the east side of the Lackawanna Depot in the Town of Morristown, establishing additional hack stands and regulating parking and hacking", insofar as the same affects or purports to affect or apply to the station grounds and premises of the Delaware, Lackawanna & Western Railroad Company in the aforesaid town of Morristown, is in violation of the Fourteenth Amendment

of the Constitution of the United States and is hereby declared to be illegal and void.

And it is further ORDERED, ADJUDGED and DECREED that the defendant, the Town of Morristown, a municipal corporation of the state of New Jersey, situate in the county of Morris do desist and refrain, and is hereby forever restrained and enjoined from taking or appropriating, or causing to be taken or appropriated, except by agreement with the owner and lessee thereof, or by proceedings in eminent domain according to due process of law, for a public hack stand any part of the lands and premises in the possession of the Delaware, Lackawanna & Western Railroad Company, as lessee of the Morris & Essex Railroad Company, at or near its passenger station in the town of Morristown, Morris County, New Jersey.

And it is further ORDERED, ADJUDGED and DECREED that the defendant, the Town of Morristown, do desist and refrain, and is hereby forever restrained and enjoined, by the attempted enforcement of said ordinance or otherwise, from in any manner interfering with or hindering or obstructing the complainant, the Delaware, Lackawanna & Western Railroad Company in the occupation, use or control of its said station grounds, or in regulating the place, manner or time in which public or private vehicles going to and from said station grounds shall enter, stand or wait thereon or depart from the same.

And it is further ORDERED, ADJUDGED and DECREED that the defendants, Henry Laden, Millard Laden, Francis Schmidt, Rudolph Beiser, Joseph Murphy,

Daniel Murphy, Anson R. Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Joseph Grant, William Bracey, George Van Ness, Joseph Greenberg, and all other persons who have notice of this proceeding and upon whom a copy of this decree shall be served, and each of them their servants and agents, do desist and refrain, and are hereby forever restrained and enjoined from entering upon the lands and premises of the Delaware, Lackawanna & Western Railroad Company, as lessee of the Morris & Essex Railroad Company, at or near its passenger station in the town of Morristown, Morris County, New Jersey, for the purpose of soliciting the custom or patronage of any person or persons whomsoever for motor or horse drawn cabs or hacks, and from standing or parking such vehicles upon the said premises and station grounds of the Delaware, Lackawanna & Western Railroad Company at said passenger station in the Town of Morristown in pursuit or furtherance of said purpose, and from entering upon said premises and making any use of the same whatsoever, except for the purpose of transporting and delivering persons at said station, or for the purpose of taking up and receiving passengers or persons who by order or previous arrangement shall have directed any of said defendants to take up and transport such person from said station, provided that in entering upon the said premises of the complainant for the purpose of transporting or discharging passengers at said station, or receiving and transporting passengers from said station, said defendants and each of them shall conform to and comply with the rules and regulations of the Delaware, Lackawanna &

Western Railroad Company with respect to the arrival, standing, waiting and departure of their vehicles.

And it is further ORDERED, ADJUDGED and DECREED that the complainant, the Delaware, Lackawanna & Western Railroad Company recover of the defendants its cost to be taxed by the clerk.

Dated, June 29, 1925.

J. L. BODINE,
United States Judge.

Testimony.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,
Complainant,

vs.

THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et al.*,
Defendants.

Trenton, New Jersey,
Dec. 17, 18, 22, 1924.

Before—Hon. JOSEPH L. BODINE, *D. J.*

APPEARANCES:

JOHN L. SEAGER, Esq., and MAXIMILIAN M. STALLMAN, Esq., for the Complainant.

CONOVER ENGLISH, Esq., NATHANIEL C. TOMS, Esq., and JAMES H. BOLITHO, Esq., for the Defendants.

Mr. Stallman: I would ask permission at this time to file the replications on the part of the complaint to the answers which have been filed just now by the defendants. I had an opportunity to prepare the revocation to the answer two days ago, but the answer of Mr. Bolitho, on behalf of the individual defendants, just came in too late for me

to have it ready as yet, but it will be in the same form as the one I am filing in answer, or with respect to the Town's answer, because it is in practically the same language.

Mr. English: Let me have a copy of that.

Mr. Stallman: The first paragraph of the bill, if your Honor please, is admitted by the answer.

Mr. English: Pardon me just a second, Mr. Stallman, while I look at something here.

If your Honor please, I have not seen the revocation until this moment. We set up in our answer as a part of the answer that the bill is defective for want of parties, namely that Mr. LaClare L. Welsh is a necessary party complainant, and the Morris & Essex Railroad Company is a necessary party complainant and I see the replication makes no reference to that and no application has been made.

Mr. Stallman: Do you deny it?

Mr. English: If it does I have not seen it. Oh, denies it?

Mr. Stallman: Yes.

Mr. English: Very well; it denies it.

Under Rule 43 of the United States Supreme Court rules it says:

> "Where the defendant shall by his answer suggest that the bill of complaint is defective for want of parties, the plaintiff may, within fourteen days after answer filed, set down the cause for argument as a motion upon that objection only; and where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the

defendant's objection shall then be allowed, be entitled as of course to an order to amend his bill by adding parties; but the court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require."

Apparently he elects to stand on his bill and deny the propriety of the answer. Your Honor will remember we brought this up at the time of the application for preliminary injunction, at which your Honor expressed yourelf and I presume you adhere to the same view, but since we now have a new hearing I would like to move, upon paragraphs 21 and 22 of the answer of the defendant Town of Morristown, setting up lack of parties, that the bill of complaint be dismissed.

The Court: The motion will be denied.

Mr. English: Will your Honor allow me an exception.

The Court: Yes.

Exception noted.

Exception allowed.

Mr. Stallman: With reference to the second paragraph of our bill, we offer in evidence the lease from the Morris & Essex Railroad to the Delaware, Lackawanna & Western Railroad Company, dated December 10, 1868, which is filed in the office of the Secretary of State of New Jersey under date of January 31, 1872, and at the same time I offer in evidence, or ask the Court to take notice of the Act of the Legislature of New Jersey approved February 9, 1869, being page 28 of the Pamphlet Laws of that year, and being Chapter 23 of the laws of that year, entitled "An Act to validate and confirm a certain lease and contract by

which the Morris & Essex Railroad Company leased their road to the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania." Just quoting briefly the essential parts of that statute, it provides in Section 1 that the Delaware, Lackawanna & Western Railroad Company is authorized and empowered to have, hold, use, enjoy, possess and exercise all and singular the property, franchises, immunities, rights, powers and privileges by the said lease granted and demised. That is for the term of the charter of the Morris & Essex Railroad Company, which is in perpetuity.

Mr. English: May I see the lease, Mr. Stallman?

Mr. Stallman: Yes. (Copy handed to counsel.)

Lease from the Morris & Essex Railroad Company to the Delaware, Lackawanna & Western Railroad Company, December 10, 1868, received in evidence and marked Exhibit C-1.

Act of the Legislature approved February 9, 1869, received in evidence and marked Exhibit C-2.

Mr. Stallman: Now, we offer in evidence the following deeds: the first is a deed made by Zeetus Seral and wife, to the Morris & Essex Railroad Company, dated December 9, 1846, which conveyed to the Morris & Essex Railroad Company that part of its station grounds at Morristown which includes the driveway and the station and the major part of the station grounds in dispute, which deed is recorded in the Clerk's office of Morris County on December 28, 1846, in Liber I-4, at page 535.

Deed above referred to received in evidence and marked Exhibit C-3.

Next, a deed from Joseph W. Blachley, not a deed but an award in condemnation filed December 2, 1846, and recorded in the office of the Clerk of Morris County in deed book L-4, page 535. That is for a strip within the present station grounds, which is not in controversy in this case.

Paper above referred to received in evidence and marked Exhibit C-4.

Next, a deed from Johnathan W. Potter to the Morris & Essex Railroad Company, dated March 18, 1850, recorded on November 13, 1856, in volume M-5 of deeds at page 57, which includes a narrow strip of land to the westerly end of the station grounds.

Paper above referred to received in evidence and marked Exhibit C-5.

Next, a deed made by Caleb F. Lindsey to the Morris & Essex Railroad Company, dated October 16, 1846—I would like to correct my statement, that is an award in condemnation, recorded in the office of the Clerk of Morris County in Book M-4 of deeds at page 67, and which covers the main right-of-way practically beneath the bridge at the westerly or northerly end of the station grounds.

Paper above referred to received in evidence and marked Exhibit C-6.

Next, a deed made by Samuel F. Headley and wife to the Morris & Essex Railroad Company

dated September 24, 1856, and recorded in the office of the Clerk of Morris County on October 28, 1856, in book L-5 at page 503, which covers a small tract of land lying northerly of the station grounds and is not particularly involved in this controversy.

Paper above referred to received in evidence and marked Exhibit C-7.

Next, a deed made by Theodore F. Randolph and wife to the Morris and Essex Railroad Company, dated July 1, 1869, and recorded in the office of the Clerk of Morris County in Book Q-7 of deeds at page 36, which covers three small parcels of land about at the intersection of Morris Street and Elm Street on the eastbound tracks and is not particularly involved in this suit.

Paper above referred to received in evidence and marked Exhibit C-8.

Next, another deed from Theodore F. Randolph and wife to the Morris & Essex Railroad Company, dated September 6, 1875, and recorded in the office of the Clerk of Morris County on September 24, 1875, in Book H9 at page 446, which covers a part of the right-of-way, the main right-of-way, a small gore, near the Morris Street bridge.

Paper above referred to received in evidence and marked Exhibit C-9.

Next, a deed from William L. King and wife dated November 1, 1881, and recorded in the Clerk's office of Morris County on December 8, 1882, in Book X-10 of deeds, at page 387, which

covers a small tract of land just west of the undercrossing north of the station, over where the driveway on the westerly side is located.

Paper above referred to received in evidence and marked Exhibit C-10.

Next, a deed from William L. King to Morris & Essex Railroad Company, dated July 18, 1887, recorded in the office of the Clerk of Morris County on the 16th of November, 1887, in Book E-12 of deeds at page 441, which includes a small gore of land on the westerly side of the railroad, in the northerly part of the station grounds.

Paper above referred to received in evidence and marked Exhibit C-11.

Also a deed from the Hudson Realty Company to the Morris & Essex Railroad Company, dated July 10, 1910, and recorded in the office of the Clerk of Morris County August 23, 1911, in book A-21 at page 577, which includes that part of the station grounds at the corner of Morris Street, running back along the freight track to the undercrossing, being all on the westerly side of the railroad.

Paper above referred to received in evidence and marked Exhibit C-12.

And a deed from the Morristown and Erie Railroad Company to the Morris & Essex Railroad Company, dated April 23, 1913, recorded in the office of the clerk of Morris County July 5, 1913, in book B-22 of deeds at page 188, which releases to the Railroad Company a small strip of land that evi-

dently was formerly a crossing across the station grounds.

Paper above referred to received in evidence and marked Exhibit C-13.

Also a deed from R. B. McEwen and R. W. McEwen, trustees, to the Morris & Essex Railroad Company, dated April 23, 1913, and recorded in the office of the clerk of Morris County, July 5, 1913, in Book B-22 of deeds at page 185, which conveys to the Morris & Essex Railroad Company an additional strip of right-of-way adjacent to Lackawanna Place, the southerly end of the station grounds opposite Lumber Street.

Paper above referred to received in evidence and marked Exhibit C-14.

Those deeds cover all the property in the station grounds in Morristown.

We now desire to offer in evidence the contract of 1912, known as the Track Elevation Contract, between the Delaware, Lackawanna & Western Railroad Company and the Town of Morristown, the original contract is of course typewritten and has a lot of maps attached to it. It would be very inconvenient to retain it as an exhibit. I will ask counsel whether he desires to substitute for it a printed copy.

Mr. English: No objection to that, except the maps are material and should be exhibited to the Court.

The Court: Why don't you have the original contract marked as an exhibit, and then you may use the printed copy in the course of the trial, and the

exhibit may be withdrawn in the custody of Mr. Stallman, counsel for the Lackawanna Railroad.

Mr. English: That is satisfactory.

Mr. Stallman: This is the original.

Paper above referred to received in evidence and marked Exhibit C-15.

WILLIAM F. GRIFFITTS, sworn on behalf of the complainant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Mr. Griffitts, where do you reside? A. I reside, my office is in New York City, 90 West Street.

Q. You reside in East Orange? A. East Orange; yes, sir.

Q. You are the passenger traffic manager of the Delaware, Lackawanna & Western Railroad Company? A. I am.

Q. And have been for how long? A. For the past four years.

Q. And previous to that time— A. General Passenger Agent, for a period of twelve years.

Q. How long have you been connected with the Lackawanna Railroad? A. Twenty-six years.

Q. Twenty-six years; and during that period has it been very largely in connection with passenger traffic? A. Entirely, almost, sir.

Q. Have you been familiar with the layout and business done at the Morristown station during that period? A. Yes, sir.

Q. Have you, in the course of your duties, in connection with passenger traffic visited Morristown Station? A. Yes, sir.

Q. Very often? A. Yes, quite often.

Q. I show you the blueprint map attached to the bill of complaint in this case, calling your attention to the location of Morris Street, the street where the trolley cars run, and the freight house toward the north driveway, along the northerly side of the station grounds, where it crosses beneath the railroad, comes out on the westbound track, and also to the street known as Lackawanna Place, and particularly to the yellow line drawn on the map; what does that yellow line mean? A. Well, it includes the driveway around the station there.

Q. That is what you call the station ground?

Mr. English: Let him testify.

Q. Depot ground? A. Yes.

Q. What is that area shown in yellow used for? A. That area you mean on the inside here?

Q. Inside of the yellow line between Morris Street and the freight tracks and— A. Well, it is used for decorative purposes.

Q. I mean what use is made of it, who occupies it? A. The Railroad Company.

Q. Which Railroad Company? A. The Delaware, Lackawanna & Western Railroad Company.

Q. For what purpose? A. For the purpose of the station, the grounds.

Q. And do you remember when that present layout was constructed? A. Why, the present layout, approximately, let's see, I should say four or five years ago.

Q. Well, it was ten. A. Time flies pretty rapidly

Mr. English: It was twelve, I think.

Q. You remember the layout, the old layout before this new layout was built, do you? A. Yes, I have a vague recollection of it, sir.

Q. During your connection with the Railroad Company, during the past twenty-six years, can you say whether or not that property has been used for passenger purposes? A. To the best of my knowledge, yes.

Q. Now, what is the character of traffic that is handled at that station by the Delaware, Lackawanna & Western Railroad Company? A. Well, of course —

Q. First,—pardon me—first, this particular layout which we call the station grounds, is it for passenger or freight business? A. For passenger business.

Q. For passenger business? A. Yes, sir.

Q. And what phase or class of the passenger business makes the greatest use of this property? A. Of course, to a large extent suburban traffic to and from New York City. There is also, of course, some what we call intra-state traffic, but the largest part of it is interstate traffic.

Q. Moving between Morristown and New York City, do you say? A. Yes, sir.

Q. Can you give the Court some idea of the volume of that traffic? A. We estimate approximately 3,000 passengers per day in and out of Morristown, that is in both directions, are handled on our trains.

Q. Will you tell the Court whether there is any tendency or gradual increase in the volume of traffic handled at that station? A. Yes, there has been a gradual increase during the past four years, I should say.

William F. Griffitts. Called by Complainant. Cross.

Q. In a general way, Mr. Griffitts, does the present layout of stations, driveways and facilities on the station grounds afford better and more commodious accommodation than the old layout? A. Yes.

Mr. Stallman: I think that is all.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Mr. Griffitts, what is your source of knowledge of the volume of traffic? A. The reports filed in my office, sir.

Q. I see. When you say 3,000 in and out, I suppose that means roughly 1,500 individuals, doesn't it, leaving in the morning and coming back at night? A. Approximately, yes, commuters of course go in in the morning and come out in the evening.

Q. You do a pretty substantial business between Morristown and points west in New Jersey and Morristown and points east in New Jersey, do you not? A. Yes; not so much east since that bus line was put in.

Q. The bus has cut into you somewhat, has it. You have a good many passengers down to Summit, the Oranges and Newark, haven't you? A. Quite a few; yes, sir.

Q. Do you know how many go to Newark as compared with New York? A. I should say, let's see, five, possiblly more than two-thirds of the total go to New York as compared with Newark.

Q. I see. Newark, though, is increasing all the time as a city to which commuters come and go, isn't it? A. Not the ratio that New York is increasing.

Q. Now, I suppose you are familiar with the layout of your present station property up there? A. In a general way, yes.

Q. When your passengers come in on your trains they alight on a platform which is a considerable elevation above the street level, isn't it? A. Yes.

Q. They go from that platform down a stairway to the level of the ground? A. Yes.

Q. They go either under the tunnel going in a southerly direction to go out on that side of the station or they go and get in a conveyance at the street level and drive off, that is true? A. Yes.

Q. Do you know where Lackawanna Place is, Mr. Griffitts? A. It is located on the western side, as I recall it, of the station.

Q. You mean on the westbound side or the westerly side? A. Well, on the side where the westbound track is, as I recall it.

Q. Comes in, yes. How recently have you been up there at the station? A. Oh, not since last fall.

Q. I see. Now, Lackawanna Place runs, roughly, north and south, does it not, along the side of your elevation wall, I mean roughly east and west? A. It runs, as I recall it, about north and south.

Q. Yes; that is right. And if you start at the southerly end of Lackawanna Place and go northerly on that street you physically go into the driveway which is along the easterly elevation wall of your tracks, don't you? A. As I recall it, yes.

Q. I will just refresh your recollection from the map here that your counsel showed you.

Mr. Stallman: Is this cross examination, Mr. English?

Mr. English: Yes; on this map, you showed him the map and asked him about it.

Mr. Stallman: All right.

William F. Griffitts. Called by Complainant. Cross.

(Question read as follows: "And if you start at the southerly end of Lackawanna Place and go northerly on that street you physically go into the driveway which is along the easterly elevation wall of your tracks, don't you?") What do you say? A. Yes.

Q. And as far as you can judge, by looking at the thing on the ground you can't tell where Lackawanna Place leaves off and the driveway on the station property begins, can you?

Mr. Stallman: I object to that as not being cross examination or material or relevant.

The Court: I can't see it.

Mr. English: I think it is cross examination, and I think it is material and relevant with what will follow further, as I hope to demonstrate this property on the driveway is devoted for public use, and so far as the physical layout goes there is no distinction between it and the undisputed public streets.

The Court: Well, I think you might establish that by someone who is more familiar with the property.

Mr. English: Mr. Griffitts is the passenger agent and was qualified as being familiar with the property, he has been with the Railroad twenty-six years and frequently at the station.

The Court: No; he has qualified as knowing what the business done at the station is and the nature of that business. As I understand his testimony, it was with respect to paragraph 4 of the bill; that is practically the compass of it.

Mr. English: I assume so, although counsel didn't say so. Does your Honor overrule the question?

The Court: Yes.
Mr. English: Exception.
Exception noted.
Exception allowed.

Q. Isn't it true, Mr. Griffitts, that vehicles both private and public drive up Lackawanna Place and on the station driveway and around under the driveway under the tracks and out into Morris Street? A. I am hardly able to answer that on my own information because I haven't—

Q. You are really not very familiar with the station property, after all? A. No; only in a general way, as I stated before.

Mr. Stallman: That is all, Mr. Griffitts.

JOHN G. ENDERLIN, sworn on behalf of the complainant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Mr. Enderlin, you are connected with the Delaware, Lackawanna & Western Railroad Company? A. Yes, sir.

Q. In what capacity? A. Assistant Secretary and Assistant Treasurer.

Q. And as Assistant Secretary have you in your charge the records of the minutes of the corporation, contracts, and so forth? A. I have.

Q. How long have you been connected with the Railroad Company? A. Approximately twenty-one years.

Q. During a large part of that time you were the Secretary to the President, were you not? A. I was.

Q. Do you know, of your own knowledge, or from examination of the records of the Company whether or not there is any paper, record, minute, documentary evidence of any kind showing that the Railroad Company has conveyed any part of the station grounds at Morristown which it has acquired, made any conveyance or grants of this property there that you know of? A. I do not.

Q. I ask you specifically whether or not you have found among the records of the Company or have any personal knowledge of any grant or conveyance of any kind to the Town of Morristown of any rights for public use in any part of the station grounds at Morristown excepting the matters which are provided in the contract, elevation contract of 1912? A. I knew of no such conveyance or permits.

CROSS EXAMINATION BY MR. ENGLISH:

Q. That is a matter that would naturally be in the knowledge of the Real Estate Department rather than yours, wouldn't it? A. As to specific land conveyances.

Q. I don't suppose you as Assistant Secretary have any responsibility or knowledge of all the numerous deeds in and out of your Railroad Company, have you? A. Not of every one.

Q. I don't suppose you made any specific examination which would enable you to answer this question, did you? A. Well, insofar as contract references are concerned, I have.

Q. As far as contracts go? A. Yes.

Q. But not about deeds? A. Not deeds.

Q. If the Railroad made any deed of conveyance or a granting of rights or anything of that kind, that is not a thing that is normally in your knowledge, is it? A. Not necessarily.

Q. You haven't any specific knowledge on that one way or the other now, have you? A. Not necessarily.

REDIRECT EXAMINATION BY MR. STALLMAN:

Q. Do you know, would it be a part of your duty or would there be under your custody any minutes or resolutions authorizing the officers of the Company to execute deeds, are they in your custody? A. They are.

Q. And how long have you been Assistant Secretary and Assistant Treasurer? A. Four and one half years.

Q. Four and one-half years; you told me that. How long were you Secretary to the President? A Ten years, twelve years.

Q. Twelve years? A. Twelve years.

Q. That goes back to some period prior to 1912 does it, or starting about 1912? A. Yes, sir.

Q. By whom were the deeds executed on behalf of the Company?

Mr. English: When?

Q. During the time that you were associated with the Company? A. Usually by the President for the Company, or in his absence by a Vice President, and attested by the Secretary.

Q. Did those deeds to be executed by the President pass through your hands? A. The ones executed by the President did pass through my hands.

Q. Can you say whether or not during the twelve years you were Secretary to the President any such deed conveying any part of the station grounds, or making any grant in the station grounds at Morristown ever passed through your hands? A. No, sir.

The Court: Notwithstanding the astute cross examination, in't it a fact that conveyances for the Lackawanna Railroad are made pursuant to resolutions of the Board of Directors?

The Witness: They ordinarily are, yes.

The Court: Of course they have to be?

The Witness: Yes.

The Court: Now, you as Assistant Secretary have in your custody and control all the minutes of the directors' meetings?

The Witness: Yes, sir.

The Court: And among those minutes you find no resolutions authorizing the conveyance of a part of the station grounds at Morristown, is that not so?

The Witness: Yes, sir.

The Court: I don't know, Mr. Stallman, I think that is perfect proof of a negative.

Mr. English: May I pursue the astute cross examination further?

The Court: Isn't it immaterial, Mr. English?

Mr. English: I am not so sure whether that is immaterial or not.

The Court: Isn't your point public use?

Mr. English: That is one of my points, yes, sir.

The Court: You are not really contending there is a grant apart from the contract.

Mr. English: That is one of my points.

The Court: Well, if there be such a grant show it to this gentleman.

Mr. English: I am going to try to.

RECROSS EXAMINATION BY MR. ENGLISH:

Q. Now, Mr. Enderlin, are you aware of the fact your Company executed a deed for some of the land which now constitutes the public street known as Lackawanna Place? A. Not from your description.

Q. You don't know that? A. I don't.

Q. Are you aware that your Company has executed deed for a right-of-way across this property for drains and sewers?

Mr. Stallman: I object to that as being immaterial. My questions were as to public use. Of course if a drain is a public use, all right.

Q. You haven't any knowledge of that? A. I haven't any knowledge of that specific deed. It may have been a matter of contract conveyance.

Q. You wouldn't pretend that the many years you have been with the railroad and the hundreds of paper you handled you can remember whether any given deed conveyed a given piece of property at a given place without looking it up, would you? A. No.

Q. And the fact is you really don't know one way or the other whether or not there has been any conveyance here? A. I do know so far as the question asked by Mr. Stallman as to the station ground.

Q. How do you know that? A. From making an examination of the records.

Q. You looked that up to answer that question? A. Yes.

Q. You didn't discover in looking it up in connection with the elevation contract, your Railroad conveyed some of its property to make up the land necessary for Lackawanna Place?

Mr. Stallman: That is not conveying part of the station grounds.

Mr. English: The question of what the station ground is and when—

The Court: I think the questions relate to that portion of the property enclosed in yellow on the blueprint annexed to the bill of complaint; that is really what we are talking about.

Mr. English: I think it is but the question hasn't been put that way.

The Court: Well, your answers relate to the lands within the yellow as shown on this blueprint, is that not so?

The Witness: Yes, sir.

The Court: All right (showing witness blueprint annexed to bill of complaint).

Q. That is what you studied up, was it, to answer? A. Yes; I have no knowledge outside of the ground.

The Court: I don't like the term "studied up."

Mr. English: That is what he said.

The Court: That is what you asked him. What you meant to ask him was, that is the

land with respect to which you made your examination.

Mr. English: Well, I am only adopting the previous answer which he gave me, your Honor, in my question.

The Court: All right. That is true, isn't it, Mr. Witness?

The Witness: Yes.

Mr. Stallman: That is all, Mr. Enderlin.

ALFRED E. DEMOTT, sworn on behalf of the complainant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Now, Mr. DeMott, what is your position? A. Station supervisor.

Q. For the Delaware, Lackawanna & Western Railroad? A. Yes, sir.

Q. How long have you been station supervisor? A. Since August 1st, 1920.

Q. How long have you been employed on the railroad? A. Since May 1st, 1907; seventeen years.

Q. About seventeen years. As station supervisor what have been your duties? A. Part of my duties has been to see that our passengers and patrons receive efficient and courteous treatment from our taxicab men at the various stations.

Q. Yes, and have you any other duties to perform out side of the matter of seeing how the passengers are handled? A. See that our stations are kept in good condition.

Q. That is both as to their physical condition and cleanliness and that sort of thing? A. Seeing that

they are kept clean and our employees render the public good service.

Q. And what territory have you had? A. Cover the territory in the State of New Jersey.

Q. I see. Now, have you visited the station at Morristown? A. Yes, sir.

Q. Very frequently? A. I visit the station in Morristown twice a week.

Q. Over what period? A. During the year 1922.

Q. Were you there in 1921? A. Yes, sir.

Q. How often? A. Well, it was about twice a week in 1921.

Q. Yes; and you have been there during the year 1923? A. Yes, sir.

Q. How often? A. At least twice a week.

Q. During the year 1924? A. Twice a week.

Q. Now, during the year 1922 did you observe or did there come to your attention anything with relation to the cabmen at that station which caused you to make a report to your superiors? A. Yes, sir, the condition—

Q. What was it that you observed and reported? A. Getting off the train at night, taking the subway in the main waiting room of the station I found three or four taxicab drivers loitering in the station, using these seats that are used for passengers, smoking. The minute the train comes in they immediately leave their seats, enter the subway and start to solicit business in a very boisterous and loud manner, and standing there in groups which I warned them, told them unless they handled themselves more orderly on the—

Mr. English: I object.

A. Station grounds—

Mr. English: I object to that.

Mr. Stallman: I think, if the Court please, under the decision of the United States Supreme Court in the Chicago case, Donovan vs. the Pennsylvania Railroad Company, it is perfectly proper to show the conditions which obtained at the station.

The Court: That being the reason for the adoption of the rules?

Mr. Stallman: Yes.

Mr. English: Your Honor, we are here on an allegation, as far as the Town is concerned, we passed an ordinance which they say is illegal and invalid as to them, and this ordinance was passed and adopted in October of 1924. I think to go back to a detail of the situation two years previous to that is immaterial to this issue. The fact of the contract with Welsh, say, is not a matter that can be disputed, and when they offer it in evidence it will go in evidence. That fact being established, it seems to me the only thing we are concerned with knowing is not what the cabmen did two years ago but what the present situation is as outlined in the bill.

The Court: I think you must show they made a reasonable provision.

Mr. English: Granting that, taking your Honor's view or at least counsel's view, they would show that after they have put in evidence their contract. He is going back of the date of the Welsh contract to a condition they say prompted the contract. They can't rise higher than their contract.

The Court: That it was reasonable for them to enter into the contract, I think they ought to show that. I think I will allow it.

Mr. English: Exception.

Exception noted.

Mr. Stallman: What was the last part?

Mr. English: I was objecting to what he told the cabmen, giving the other side the full benefit of your Honor's ruling.

The Court: Yes; I think what he told the cabmen is inadmissible.

Mr. Bolitho: On behalf of the cabmen I should like to object to this testimony unless he designates the particular cabmen.

The Court: I am sustaining Mr. English's objection to the conversations with unknown cabmen.

The witness can say that the cabmen were boisterous and that they continued notwithstanding what he said to them to be boisterous.

Q. You stated you found the cabmen occuping the passenger station and conducting themselves in a certain manner and that you spoke to them. After you spoke to them was there any change in the situation? A. After I had spoken to them, about two weeks after I notified them all that condition, and then the same condition existed same as it did before I spoke to them.

Q. Yes. A. And also warned them again, so the latter part or in August it was—

Q. August of 1922? A. 1922; I reported to my superior, Mr. White, the superintendent, that—

Mr. English: I object to what you reported.

The Court: Yes.

Q. All right; you made a report. Now, at the time that you noticed the conditions which you have

described and reported to your superior did you at any time ever see any police officers of the Town of Morristown at or near the station? A. Yes, sir; I have seen them officers at the Morristown station between 4.47 and 5.30, around that hour, and around six o'clock.

Q. P. M.? A. P. M., during the evenings at the rush hour; I have seen them there quite often.

Q. How about the other times during the day? A. During the day I didn't see any around; that is in the forenoon or in the afternoon, I never saw any there, but particularly during that hour in the evening there was an officer there.

Q. Did you ever see any officers there at the time of the occurrence of the things which you have described, the conduct on the part of the cabmen?

Mr. English: I object to that.

A. I never saw them.

Mr. English: Pardon me a minute. I don't see what materiality that has, on any issue in this case.

Mr. Stallman: I will show the materiality if the Court will permit me.

The Court: Very well.

Mr. Stallman: For some reason the Town sets up in its answer that they have always maintained police officers in and about the Morristown station for the purpose of regulating things. I might be privileged to anticipate the production of that defense.

The Court: All right.

Mr. English: Pardon me; what we say in the answer, let us have the answer right because

it is in typewriting, that it claims and has always claimed the right to exercise all necessary police powers.

It doesn't say that it always had an officer around there at all.

Mr. Stallman: All right; we will understand that much.

Q. At the time there was an officer at the Morristown station between 4:47 and 5:30, at the times when you say that cabmen were loitering in the station using certain kind of language, and so forth, did you on those occasions ever see a police officer of the Town of Morristown at the station? A. I have seen them at the station on the lower plaza.

Q. Yes. Were they in a place where they could have observed the conduct of the cabmen? A. Yes, sir; the boisterous solicitation and the grouping as passenger trains or passengers were alighting from the trains, they were there where they could see it.

Q. Did you on those occasions see the police officers take any action? A. Never saw them take any action during that time.

Q. Did you know what contract was made with LaClare L. Welsh? A. Yes, sir.

Q. Did you have anything to do with the making of that contract? A. Yes, sir, I—

Q. You can answer yes or no. Did you arrange for that contract? A. Yes, sir, I did.

Mr. Stallman: I offer the contract in evidence; it being attached to the bill of complaint you don't want it read?

Mr. English: No.

Contract received in evidence and marked Exhibit C-16.

Q. After the contract was made with Mr. Welsh was it a part of your duties to observe how that contract was performed on his part? A. Yes, sir.

Q. And what to your knowledge did Mr. Welsh do in the performance of that contract? A. It was under December 29, 1922, and we put this contract in effect at the station, that is they had one of the Company officers with me and we went out to Morristown, the contract had been signed, and we put it into effect, notifying the taxicab drivers that Mr. Welsh had the exclusive privilege on the station grounds for the solicitation of the taxicab business.

Q. Did you at that time post or serve a written notice upon the taxicab drivers? A. Yes, sir. We, Lieutenant Hayes, he furnished the, served the taxicab drivers with a notice.

Q. I show you a paper entitled, "To whom it may concern," dated January 10, 1923.

Mr. English: Don't read it until we see it.

Q. Signed Delaware, Lackawanna and Western Railroad Company, by R. M. White, Superintendent. Is that a copy of the notice to which you have made reference? A. Yes, sir.

Mr. English: On behalf of the town of Morristown I object to that as immaterial as against the town, and further as immaterial in the suit because of the fact that it relates to a situation a year and some ten months before the matters which are the subject matter of the bill of complaint.

The Court: I will allow it and allow an exception.

Exception noted.

Paper above referred to received in evidence and marked Exhibit C-17.

Mr. English: Will your Honor allow me an exception?

The Court: Yes.

Exception noted.

Exception allowed.

Q. In what matter was that notice posted and where? A. Mr., the Lieutenant Hayes notified them, served them with a notice, and there was a notice put up at the telephone booth.

Q. Where was the telephone booth? A. It is on the lower plaza of the West bound side of the Morristown station. There was a notice posted right on the telephone booth.

Q. Is that in a place where the taxicab men could see it? A. Yes, sir.

Q. Well, then, after this notice had been posted and the cabmen had been notified that Welsh had the contract to render the taxicab service, what did Mr. Welsh do about carrying on his contract? A. He had his cars there and he had a starter there to direct the passengers to the cabs.

Q. A starter on the platform? A. Yes, sir, and he solicited traffic there.

Q. Did you notice what kind of taxicabs he had? A. Yes, he had a very good, that is very good taxicabs something that was sanitary, up to date, nice appearance, in conjunction with the station.

Q. Do you remember what make of cars they were? A. Well, he had, I counted at least three or four Cadilac limousines, two Buick sedans, one Yellow Cab and the equipment was very good, sani-

tary cars, the cars were kept in good condition, well kept up.

Q. As station supervisor in charge of the conveyances for the railroad company's passengers, has there come to your knowledge any consent or permission given by the Delaware, Lackawanna & Western Railroad Company to anyone else to use the station grounds for the parking of taxicabs or the solicitation of taxi business? A. Yes, sir, yes, at the Newark station we have—

Q. I mean at Morristown, I don't mean at Newark. Did anyone beside Welsh have that permission? A. No, sir.

Q. Mr. DeMott, after that notice was served and Mr. Welsh provided this equipment did the taxicab men comply with that notice generally? A. No, sir, they still parked their cars there and done their soliciting, stating that the town of Morristown had advised them to stay right there.

Q. After this notice was posted did these men continue to bring their cars into the station grounds? A. Yes, sir.

Q. And continued to solicit the patronage of persons? A. Yes, sir.

Q. Do you know the names of the taxicab men at Morristown? A. Yes, I knew them all at that time.

Q. Have you got a list of these names before you? A. Yes, sir.

Q. Referring to that list can you say which of these taxicab men continued to come on the premises of the railroad station after the posting of this notice?

Mr. Bolitho: I object to that.

A. Yes, sir.

Mr. Bolitho: I object to that.

The Court: Yes, I think that objection is well taken.

Who made up the list?

Mr. Bolitho: He is reading from the bill of complaint.

Mr. Stallman: He has an affidavit of the service made of certain notices on different parties, and inasmuch as there are sixteen names I don't think there is anything particularly improper in just having him testify from his list those upon whom he made service or who did certain things. It certainly will save time. It is not leading.

The Court: No, but he is testifying from a document. Now, of course, that which he has in his own handwriting made up he may use to refresh his recollection.

Mr. Stallman: Isn't the rule a little broader than that, your Honor, that a man's recollection might be refreshed from reading any writing that will have that purpose of refreshing his recollection?

The Court: Very well, if he knows something about the document. If it has ever come to his hands before he may use it.

Q. Let me ask you this, Mr. DeMott. Did you make up a list of the taxicab men down there? A. Yes, sir, I had a record I submitted to our attorney.

Q. Turning in the names? A. Yes, sir.

Q. To the Company's counsel? A. Yes, sir.

Q. Can you recall all of the names without referring to a list, do you suppose? A. I couldn't recall them all, I can cite different ones.

Q. Well, now, can you without referring to the list, let us see how good a memory you have, tell us which of the taxicab men came on the station grounds at the time in violation of your notice.

Mr. English: May I ask at what time, you say "at that time"?

Q. Well, after the notice was posted? A. Yes, there were the Murphy Brothers, Joseph Murphy and his brother.

Q. Joseph Murphy and his brother, is that Daniel Murphy? A. Daniel.

Mr. Bolitho: Just a minute, I object.

A. Joseph and Daniel Murphy, at that time.

Mr. Bolitho: He is suggesting the answer to the witness.

Mr. Stallman: No, he said the Murphy Brothers.

The Court: Yes.

Q. Who beside the Murphy Brothers? A. Henry Laden.

Q. Yes. A. His son, I think his name is Millard Laden.

Q. Yes. A. Powers.

Q. Is that Thomas? A. Tom Powers, I think they call him, and there were sixteen, sixteen at the station at that time. I remember counting them. Tim Callahan, but he is deceased now, but he was there.

Q. Yes, Callahan is dead. Do you see any of these taxicab men in the room? A. Yes, sir.

Q. Any of those men? A. Henry Laden was one of them, and the other gentleman that sits next to him, but I forget his name, whether it is Bracey or Tanner.

Q. Bracey? A. Tom Powers.

Mr. Bolitho: I object.

A. Mr. Powers.

The Court: The Witness has not benefited by the suggestion.

A. Mr. Murphy.

Mr. Stallman: Well, all right.

Q. Then, there was some litigation in the Court of Chancery about that situation, was there not? A. Yes, sir.

Q. And during all that time these taxicab men kept off the property, didn't they? A. No, they continued to go on the property until a temporary injunction was served on the Town of Morristown.

Q. Well, that was along in February of 1923, wasn't it? A. They still continued to that time.

Q. Until that injunction was served? A. Yes, sir.

Q. And after that they remained off the property? A. Yes, sir.

Q. Until what time? A. Until—

Q. Do you remember the passage of this last ordinance of October 23, 1924? A. Yes, sir.

Q. With reference to that time when did these taxicab men come back on the property? A. Back in October, latter part of October, I should judge.

Q. Did you see them there? A. Yes, sir.

Q. Did you see them come back? A. Yes, sir.

Q. How did they do it? A. Come back with a regular taxicab stand, I was up there a very few nights afterward to see how they acted and performed.

Q. Yes. A. I was there for two hours.

Q. Yes, what did you see? A. I saw the drivers actively soliciting business in a very boisterous manner.

Q. What do you mean by boisterous manner? A. They would announce the cab so far you could hear it about two blocks away or three.

Q. Where did they stand to do that? A. Right at the entrance of the lobby on the westbound side they were bunch there. We have an entrance there where they use the sidewalk. They were bunched so they couldn't get through, the entrance was so obstructed so they couldn't use the sidewalk.

Q. Who couldn't use the sidewalk? A. Passengers getting off the train.

Q. Where were these cabs stationed? A. Just west of the main entrance on the westbound side backed up to the curb.

Q. Then when this Court rendered an injunction did the cabmen remove from the station premises? A. Yes, sir, went out there one night, they were there, the next night they were gone.

Q. What is that? A. Yes, they left the Company's property after that injunction was granted.

Q. Yes. Have you observed whether or not any number of the passengers of the Railroad Company use their own automobiles to come or to depart from the station? A. Yes, sir, they do.

Q. Can you give the Court an idea to what extent that practice is indulged in? A. Yes, coming in

there at night during the rush hours there is at least twenty-five or thirty cars parked, private cars, on the westbound.

Q. Twenty-five or thirty? A. Yes, sir.

Q. Have you observed whether as a rule they are driven by chauffeurs or others? A. There is at least ten which are driven by a chauffeur.

Q. Has the Railroad Company any other place or facilities for taking care of these private cars of its passengers excepting the driveways adjacent to the station? A. No, sir, they are parked on both sides of the station. Our eastbound side is parked with cars and our westbound side is parked with cars.

Q. That is private cars you are speaking of? A. Yes, sir.

Mr. Stallman: I think that is all unless there is something I have overlooked.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Now, Mr. De Mott, how do you happen to be going to the Morristown station so regularly, twice a week, for four years? A. I have a lady friend there I visit about twice a week.

Q. Are you still keeping that up? A. Still continuing.

Q. Without going into any personal affairs of yours, what time do you normally arrive at Morristown. A. Any time from five o'clock until eight.

Q. I see. What time do you normally leave at the station? A. Well, there is nights I use the trolley and sometimes the train.

Q. I see. Now, I assume when you go on that interesting errand which takes you to Morristown

you don't hang around the station to look up taxicab men or policemen or anything of that kind, do you, you are rather in a hurry to get to your objective, aren't you? A. No, sir. Any station I visit is always gone over, I look through it to see what is going on, see what is doing, the condition of it.

Q. You say customarily twice a week for the last four years you took off time on the way to your lady's house to inspect this station and look over the cabmen and see how many policemen were there, and things of that kind? A. I observed the condition of the station, the taximen, platform, waiting room.

Q. You either don't comprehend or aren't quite answering my question. I want to know whether you took off time to look around and go through the station and see who was loitering around there and who was not, and things of that kind? A. Yes, sir.

Q. You did every time, twice a week? A. Yes, sir.

Q. Right along. The time of the occurrences you spoke of when you found these cabmen loitering in the station was in 1922? A. Yes, sir.

Q. Then in the winter or latter part of 1922 your company made this contract with Welsh, which is now in evidence as Exhibit C-16? A. Yes, sir.

Q. You followed the making of that contract with an application, your company did to the Court of Chancery of New Jersey and obtained an injunction, didn't you? A. Yes, sir.

Q. So that the practical result is that since the first of the year 1923 down to the present time there has not been any loitering in the station by cabmen, has there? A. Since we have had this injunc-

tion the last time, you mean? A. I thought that was a plain question. Read it, please.

(Question read.)

A. Well, I will say at the time the injunction was served—

Q. Oh, Mr. De Mott—

A. —there has not been on the station grounds or in the station—

Q. Listen to that question and be so kind as to answer it.

(Question read.)

A. Yes, there has.

Q. There has? A. Yes, sir.

Q. When? A. About November, I should judge.

Q. November of 19 what? A. The time this new ordinance was issued by Morristown in October, putting the taxicab men back on the plaza, they visited our westbound waiting room, the westbound side, shortly after that was issued.

Q. Can you give us the name of anyone who visited your westbound waiting room? A. There were two colored men, one of them sits in the rear of the room.

Mr. Stillman: That second man back there?

The Witness: The second man to the right.

Mr. Stallman: Will you stand up?

Mr. English: I am cross examining this witness.

Mr. Stallman: Is that the man?

The Witness: Yes, sir.

Mr. Stallman: What is your name?

Mr. English: I object to that. Counsel is interrupting my cross examination, taking it right out of my hands and pointing people out in the court room to the witness.

Mr. Stallman: The witness tried to identify a man by pointing to him.

Mr. English: I suggest if counsel for the Railroad Company will conduct himself in the ordinary manner and wait until I am through he can point out anybody he wants to. My objection is to being interrupted.

The Court: All right.

Q. Do you know whether the taximan had gone there to get a bag or grip of a passenger, or anything of that kind, or don't you know? A. No, I am not positive—

Q. You don't know. You saw him physically on the platform? A. Yes, sir, in the waiting room.

Q. Now, as I understand you, Mr. De Mott, back in 1921 and 1922 and 1923 you customarily saw police officers at the station plaza particularly in the afternoons and evenings? A. Yes, sir.

Q. During the rush hours particularly? A. Yes, I should say between four thirty, five thirty, six.

Q. Directing traffic there? A. No, standing there.

Q. Standing there. Standing where? A. On the plaza. On the ground plaza there on the westbound side.

Q. Standing on the plaza on the westbound side out in the driveway? A. No, they were not standing in the driveway, the lobby.

Q. Standing near the driveway? A. No, standing on the concrete entrance.

Q. That is near the driveway, isn't it? A. It is inside, it is under the shelter house on the westbound side.

Q. You talk about a lobby, do you mean the tunnel which when you alight from the westbound train and go down stairs, if you want to go to the eastbound side of the tracks you pass through a tunnel under the tracks, is that what you call the lobby? A. That is the lobby.

Q. What I call a tunnel under the tracks you call the lobby, is that it? A. No, the lobby is where the cars pull in to receive and discharge passengers on the westbound side.

Q. When you come down the stairs from the westbound platform you go through a tunnel to a driveway, don't you, to get into an automobile? A. You do to the eastbound side.

Q. And the entrance of the tunnel is right there by the driveway, isn't it? A. Yes.

Q. That is what you call the lobby? A. That is the lobby where the passengers—

Q. The cars drive up there to that lobby to get their passengers, don't they, either private cars or taxicabs? A. Private cars?

Q. Yes. If a man stands in the entrance of that lobby and signals a taxicab he drives up to take his passenger there, doesn't he? A. Yes, sir, sometimes.

Q. As I understand you, the policeman was in that vicinity, is that right? A. He was standing there, yes.

Q. He was standing there. I don't suppose you as a railroad official made any objection to the presence of a policeman there, did you? A. If they were orderly—

Q. When did you ever see a policeman there that was not orderly? A. I said if he was orderly.

Q. Why did you say that, you never saw a policeman there who was not acting in an orderly manner, did you? A. No.

Q. Then the fact is you didn't make any objection to the presence of the policeman on the station plaza, did you? A. No.

Q. Why didn't you say so? A. I did.

Q. To your knowledge the policemen were on the station plaza running back how many years? A. I should judge for the past two or three years, if I remember.

Q. You testified back to 1921, do you go back of that? A. No. Since 1921 I would say.

Q. You haven't any familiarity with the station situation there prior to 1921, have you? A. Between the years 1907 and 1910 I worked in the freight office there in Morristown.

Q. That was before the track was elevated? A. No, it was elevated at that time.

Q. Elevated in 1907? A. Yes, sir.

Q. You think it was? A. Yes.

Q. I suppose you were there in 1907 and the present elevation was the same as it is now, is that right? A. To the best of my knowledge.

Q. That is seventeen years ago, now, do you mean? A. Yes.

Mr. English: I think that is all.

Mr. Stallman: I would like to offer at this time, if your Honor please, a copy of the restraining order by Vice Chancellor Foster in the Court of Chancery of New Jersey in January, 1923.

Mr. English: I would like to ask why?

Mr. Stallman: The purpose of the offer is to show that the Railroad Company is not guilty of laches, but at the time when it conceived that its rights were being affected adversely it acted promptly and sought relief in court to prevent the continuance of the conditions of which it complained, and asserted its rights at that time.

The Court: Can't I at any time advert to the record of the proceedings in the Court of Chancery without having them in evidence before me? Aren't they public record?

Mr. Stallman: Yes, they are public records.

Mr. English: I think it ought to appear if he is going to make the offer that the Vice Chancellor on the final hearing dismissed the bill, dissolved the injunction and dismissed the bill.

Mr. Stallman: I am coming to that.

The Court: I suppose there is no harm in having the record in proceedings in Chancery marked in evidence in this case, and then we can advert to copies of the proceedings if we need. Either side may use any part or all of those proceedings. Suppose we consider the Chancery Court proceedings as marked in evidence? Is there any objection to that by counsel for anybody?

(No response.)

Papers above referred to received in evidence and considered as being marked Exhibit C-18.

Mr. English: We are not objecting except I do want it to appear on this record if the papers are not otherwise produced the Vice Chancellor dismissed the bill on the final hearing.

Mr. Stallman: I am coming to that.

The Court: All right, sir.

Mr. English: I think it is a material fact.

Mr. Stallman: I offer in evidence an ordinance introduced in the governing body of the Town of Morristown on January 22nd, two days after the date of the Vice Chancellor's decree.

Mr. English: What year.

Mr. Stallman: And passed on final passage on February 7th, of the same year, that being the ordinance which prohibited the use of the station grounds by any taxicab man.

Mr. English: I think the ordinance speaks for itself. Do you want to put it in evidence?

Mr. Stallman: I will furnish a copy of that.

Mr. English: What is your offer?

Mr. Stallman: I am offering the ordinance.

Mr. English: I think there ought to be coupled with the offer the statement that this ordinance was certioraried by La Clare L. Welsh to the New Jersey Supreme Court, and that the Supreme Court of New Jersey sustained the ordinance.

We can give you a certified copy if you want it, Mr. Stallman.

Mr. Stallman: You can substitute that.

Mr. English: Very good.

Paper above referred to received in evidence and marked Exhibit C-19.

Mr. Stallman: I am willing to stipulate on the record at this time, as suggested by Mr. English, that this ordinance, C-19, was certioraried by Mr. Welsh and its validity sustained in the Supreme Court of New Jersey, and subsequently by the Court of Errors and

Appeals, the last resort in all cases for the same state.

The Court: Let it appear, however, there was a dissent in the Court of Appeals.

Mr. Stallman: Yes, by Katzenbach and Clark, J. J.

Mr. English: We can give you the record in the case, if your Honor would like to have it, and there wouldn't be any question about it.

Mr. Stallman: Without arguing, I just want to call the Court's attention to the fact that that certiorari prohibited the use of that ordinance which was sustained on certiorari, prohibited the use of the station grounds by any taxicab man.

Mr. English: What is that?

Mr. Stallman: I am willing to stipulate, as requested by Mr. English, that upon the entry of the judgment of the Court of Errors, the final hearing on the bill for injunction in the Chancery Court was moved and it came on for a hearing in the first part—

Mr. English: I can give you the date of the order of dismissal, the decree of dismissal was dated October 7th, 1924.

Mr. Stallman: The first part of October, that is October 7, 1924, and I call your Honor's attention to that part of the memorandum filed by Vice Chancellor Foster in which he says that the restraining order is dismissed because the railroad company had obtained all the relief that it required in keeping those taxicab men off its premises by the ordinance which had been sustained.

Mr. English: You ought to correct that last statement about that decree. While the decree

was signed on October 7th, the hearing before the Vice Chancellor was, I think, a week or ten days before that, September 21, 1924, at which time he expressed himself, expressed his views, in which he concluded he would dismiss the bill and subsequently have the decree signed:

Mr. Stallman: Yes.

I offer in evidence the ordinance which is now the subject of the suit, which was introduced before the Mayor and Board of Aldermen of the Town of Morristown on the day following the entry of that decree of the Court of Chancery, that is on the 8th of October, 1924, and which was passed on final passage at a meeting of the Mayor and the Board of Aldermen on the 22nd of October, published and became effective on the 23rd of October, 1924.

Paper above referred to received in evidence and marked Exhibit C-20.

Mr. English: I will put on the record the case of Welsh vs. Morristown, reported in the Supreme Court, 98 New Jersey law, page 630, and affirmed by the Court of Appeals of New Jersey as reported in Volume 2, New Jersey Advance reports, Pamphlet No. 16, page 662, and as your Honor has already suggested in the Court of Appeals there were two dissenting votes, one by Justice Katzenbach and the other by Judge Clark.

La Clare L. Welsh. Called by Complainant. Direct.
M. H. Coggeshall. Called by Defendants. Direct.

LA CLARE L. WELSH, sworn on behalf of the Complainant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Mr. English: We have a witness who is a very busy man in New York. He is one of the Board of Aldermen of the town, and he is anxious to get back to his office. I wonder if we could take his testimony now?

Mr. Stallman: I have no objection at all.

Mr. English: And let this witness stand aside for a moment?

Mr. Stallman: Yes.

MURRAY H. COGGESHALL, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Coggeshall, you live in Morristown, you are a citizen of Morristown? A. I am.

Q. How long have you lived there? A. About fifteen years.

Q. What is your business Mr. Coggeshall? A. I am in the brokerage and banking business.

Q. Talk a little louder. A. I am in the brokerage and banking business.

Q. What is your firm? A. Coggeshall and Hicks.

Q. Any other business, are you a director of any companies? A. I am a director of several public service corporations, the Morristown Trust Company and two or three other corporations.

Q. Do you hold any official position in the Town of Morristown? A. I am a member of the Board of Aldermen.

Q. How long have you been such? A. About twenty-five years.

Q. Are you on any committee of the Board of Aldermen? A. I am on the Police Committee, Chairman of the Street Committee, have been chairman of that committee for four, four and one-half years.

Q. Does the Police Committee have anything to do with the regulation of traffic in the Town of Morristown? A. It has full charge.

Q. Full charge of it. What, if anything, did your Committee do with respect to the situation at the Lackawanna station since the making of the contract between the Railroad and Welsh, which is Exhibit C-16 in this case? A. The first that we had ever heard, at least I had ever heard, and I think the Mayor and Board, was when we received a letter as I remember, about two years ago this month from the Lackawanna, just before the expiration of Mayor Barkman's term, that our taxicab system was not a satisfactory one for the Town of Morristown, and that the Lackawanna Railroad appreciating that fact wanted to give us a better service.

Q. Is that what the letter said? A. This was a letter to the Mayor and Board, and the conditions were not entirely satisfactory at the station to them. This was the first I think that any of us had heard of this being the case. I had felt that our system had been satisfactory. I had heard no complaints.

Mr. Stallman: I think that is probably immaterial, if your Honor please.

The Court: You have got to assume that the trial Judge has some discretion.

Mr. Stallman: I do.

A. (Continuing) And felt really that this was an intrusion, in a way. I felt it was an insult to the Mayor and the Board, that they knew better than we did, the chosen representatives of the people of the town, who were giving our services—and, incidentally, Judge, our services are free, we receive no compensation, it is extra night work—that they knew better than we did how to carry on our taxicab system, it seems to me was an insult to our intelligence, and I felt so steadily from the start. But nothing more came up for the time until a little later, it may have been a month or two, I don't remember the date exactly, they sent word to us to have their counsel appear before our Board to make a statement, and he came before our Board and made a statement in which a very large part, the early part was the excellent service and for the good of Morristown that the Lackawanna Railroad intended to do.

I will admit very frankly I was suspicious by that time and asked the Mayor if he would see whether there was any financial remuneration in that contract, when Mr. Seager asked the Clerk to examine the contract, and in that contract a few paragraphs down was a statement that the Lackawanna Railroad was to receive ten per cent. of the gross returns by doing this serviceable act to the Town of Morristown. I admit very frankly I was, didn't feel there was much public service in their efforts after that, as I did before, and in fact I wondered why before because for some years we had gone along handling this traffic without any

complaints from the Lackawanna, as far as I remember. Certainly as Chairman of the Street Committee I am sure I had received no complaints from them that things were not going satisfactorily at the railroad, and I have felt that this was our province.

Q. Following the making of the contract then what happened at the station as you were informed and believed? A. Then they were, the men were ejected as I remember it, under the—

Q. You mean the cabmen? A. I mean the cabmen.

Q. Are you a commuter on the Lackawanna Railroad? A. I am.

Q. So you are pretty familiar with conditions at the station? A. I think I am exceedingly familiar with them, and have been for years, and also I think I can state very strongly I am very strongly familiar with the sentiment of the people, I think the great majority—

The Court: Wait a minute.

Q. Never mind that, Mr. Coggeshall. It appears in the case that the Chancery Court of New Jersey granted a preliminary injunction which lasted from about February of 1923 until the early part of October of 1924. During the period of that injunction where did the public cabmen park their taxicabs? A. They were taken away from the regular place and part of the time parked across the station, and I think some of them were not able to get in very well.

Q. You speak of the regular place, where? A. Where they had been accustomed to stand for some years.

M. H. Coggeshall. Called by Defendants. Direct.

Q. On what is the driveway on the Lackawanna station grounds? A. Personally, I have always felt that was practically a public street. It is of no use to the railroad.

The Court: Wait a minute. Strike that out.

Q. It was on that driveway that is on the station grounds? A. Yes.

Q. Do you know prior to the making of the Welsh contract and the granting of that injunction in the New Jersey Court for how long the taxicabs had been parked on that driveway? A. That is one of the things I couldn't understand because they had been parked there for years.

The Court: That is not responsive to Mr. English's question.

Q. (Question read.) A. For years.

Q. You are familiar with the situation since the completion of the elevation? A. Yes.

Q. Do you know whether they were parked there from the completion of the elevation until the Chancery injunction? A. I know all the time.

Q. After the injunction where did those who were able to get in park? A. After the injunction?

Q. Yes. A. Towards Morris Street.

Q. Down on Lackawanna Place? A. Yes.

Q. How did that affect the accommodations to patrons of the railroad coming from the trains with respect to getting taxicab service? A. Not as convenient.

Q. Do you know whether the officials of Morristown received any complaints about that? A. I think there were complaints.

M. H. Coggeshall. Called by Defendants. Direct.

Q. Do you know whether petitions of any kind were put forward to the town authorities?

Mr. Stallman: May I interpose an objection at this time and state my reasons? In view of the legal questions we have involved in this case I think it is immaterial what petitions councilmen and other gentlemen had in mind which this gentleman may have obtained signatures on. We know how people sign petitions when they are asked, under the stress of conditions or to accommodate their friends. It doesn't seem to me the question of getting a lot of petitions signed on behalf of these gentlemen ought to be considered material in the case.

Mr. English: It is in the answer, and of course if his position is well taken the procedure should have been to move to strike out the answer, which he didn't do. That is one of the questions of fact for the determination of the Court.

The Court: As to whether there were petitions or not?

Mr. English: The answer says the petition was filed by 314 citizens, that the Board and Police Committee took it under advisement and investigated and resolved on the ordinance which is now the subject of attack in this bill. That is what I want to prove as a matter of fact.

Mr. Stallman: In my revocation I said it didn't make a particle of difference.

The Court: Well, I will tell you, Mr. English, I think I will take the proof now because the witness is anxious to get to New

York, and I may strike it out or disregard it. I will let Mr. English have leeway to put his testimony in, Mr. Stallman.

Q. The question now is as to whether any petition of any character was submitted to the town authorities? A. My understanding is a petition was circulated. I didn't see the petition, Your Honor, but I think there was a great deal of indignation aroused throughout the town—

The Court: Wait a minute.

Q. Did you see the petition after it was submitted to the town authorities? A. I did not look over the petition.

Q. Was it presented in the meeting of the Committee of the Board? A. As I remember it was.

Mr. English: Well, I have here a petition signed by a lot of signatures.

Q. Is that it?

Mr. Stallman: I object to it. The witness says he can't identify it, never saw it before.

Mr. English: He said he was present at the meting of the Committee of the Board.

The Witness: I remember having it brought up. I don't remember looking at it. I admit that freely. I have seen so many of those.

Q. You remember the fact this petition was presented to the Board? A. Yes.

Q. Following that what did the Police Committee of the Board of Aldermen do? A. Following the petition?

Q. Following the presentation of that petition what did the Police Committee of the Board of Aldermen do? A. I am not sure, I was there at the meeting on that. I know that we—

Q. Maybe you can refresh your recollection from a paper which I understand bears your signature. Is that your signature among others (indicating)? A. Oh, yes.

Q. And that is a report of the Police Committee to the Mayor and Board of Aldermen of the Town of Morristown? A. Yes, sir.

Q. Reciting the fact of a petition? A. Yes.

Q. Was that report made as a result of the study and investigation by the Police Committee? A. It was.

Q. And I observe that the report referred to an ordinance which it tendered to the Board of Aldermen for passage, is that the ordinance which is set up in this bill of complaint? A. I think that is the ordinance.

Q. You have proved that signature. That is your signature? A. Yes.

Q. What was the—

Mr. Stallman: One minute. Before you get through with that offer I want to object.

Mr. English: I haven't offered it. It hasn't been proven by the other two.

Q. Do you know the other signatures on this petition, I mean this report? A. Yes.

Q. The first one is— A. Mr. Lidgerwood, Mr. Eicklin and myself.

Q. Do you know what effect the parking of the public cabs down at Lackawanna Place had either with respect to traffic conditions at the station or

the convenience of persons seeking the taxicab service? A. I think it interfered some.

Q. How about in wet weather? A. Made it a little more difficult.

Q. Why was that? A. Further away from the main entrance.

Q. Prior to the making of the Welsh contract with the railroad what had taxicab conditions at the station been? A. I don't think, I think they had been as they had been for a good many years, we had two or three men who perhaps were not as efficient or good as they might have been. The great majority of these men were hard working, decent citizens, been in the business anywhere from five to twenty-five years. I employ one of them all the time. I have employed Mr. Welsh part of the time previously and have even since the date of his approval, or his suit, I mean. I have never seen, as a member of the Police Committee and Street Committee, I think our Mayor and Board would have taken action and strong action if we had seen any need, we have in other matters, and there is shown improved conditions all the time. Conditions have improved steadily there for years.

Q. What were the conditions in October and November of this year following the dismissal of the Chancery suit in New Jersey and before the preliminary injunction was allowed in this case, and following the passage of the ordinance which restored the hack stand to the driveway? A. At what time?

Q. What I want you to tell me is after the hack stand was re-established on the driveway before this injunction was issued what were the traffic conditions at the station? A. Conditions are better.

On the lefthand side as you come down there should be some—

Q. By the lefthand side you mean the old cab-stand that was on the driveway? A. Yes. I never personally made any strong observation of that point because I felt that police Committee, that was a question of the Police handling entirely.

Q. Oh. And prior to the issuance of the preliminary injunction in this present case were the police accustomed to have oversight of conditions on the station plaza? A. They were.

Q. And that had been going on ever since the elevation contract? A. I think so.

Q. The completion of the work under the elevation contract? A. To the best of my knowledge.

Q. It is charged in this bill of complaint the Board of Aldermen acted in bad faith when they passed this ordinance restoring this hack stand. What have you to say about that as a member of the Board? A. I don't think the Board of Aldermen can ever act in bad faith in trying to protect the rights of citizens who had what we consider and who have done service which we felt was a proper one for years.

Q. As far as your personal vote was concerned and your knowledge of the others, was it an act of bad faith or good faith and good judgment of the Board? A. Good faith absolutely.

Mr. English: That is all.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Then, as I understand it, Mr. Coggeshall, the Board of Aldermen and yourself expressing their views means that you are going to stand up for the

rights of these cabmen, in what you consider an unwarranted interference on the part of the Railroad Company in managing the station grounds? A. I think it is more than that. I think—

Q. Is it that much? A. I certainly am going to stand up for men when I think the Lackawanna Railroad is getting into the rights of the Town of Morristown.

Q. When you speak of maintaining the rights of the citizens who have rendered good and faithful service to Morristown you mean these defendant cabmen? A. I do.

Q. You say that your attention to this matter was first brought up and you became incensed at a letter written to the Mayor and Board of Aldermen by the Railroad Company which you assumed to be a letter stating that the Railroad Company was going to manage the taxicab situation in Morristown? A. I didn't say that, I said that they interfered, they stated a better service was needed in Morristown and practically stated to us they proposed to give it to us.

Q. You took that to mean the taxicab service generally in the city, in the town? A. Well, the large part of it is traffic to and from the station.

Q. Was your attention called to this letter addressed to the Mayor and Board of Aldermen of the Town of Morristown under date of January 12, 1923, and I think signed by Mr. Seager (indicating)? A. I will have to read this, I don't remember. I was there when the first letter was presented to Mayor Berkman, who read it to us. I was there.

Q. And Mayor Berkman instructed you to write a reply? A. Yes, and I was there when your counsel appeared before our Board, and told him what I felt, that I felt very strongly on the matter.

The Court: I think the witness can now testify as to that letter.

Q. Do you remember that letter? A. I think I do. I wish to say also I took exception to that as to the first one.

Mr. Stallman: I would like to have the letter marked for identification.

Paper above referred to marked C-21 for identification.

A. (Continuing) I couldn't swear I remember that letter, but I certainly remember some of the facts of it, either in discussion with your counsel—

Q. Yes.

Mr. English: What is the date of the letter?

Mr. Stallman: January 12, 1923.

Q. On or about the time this letter was written you made the statement to Mr. Seager in the meeting of the Board down there that you would do everything you could to break up this contract between the Railroad Company and Welsh, did you not? A. No, I said I would stop such a proceeding if I could, so far as I could I would fight against it, and as I also told him, to go on further if I may, that it was a surprising act for a corporation at this time and date to do, to endeavor to put through a thing of this kind.

Q. That is to establish its supervision of its taxicab service at its stations? A. It is beyond that. It is throwing out of work twenty-five or thirty men who had been permitted for years to go on, to build up a livelihood and a living, and

to have somebody come in and suddenly take away the good will, and so forth, that had been established through long years of work and through—

Q. That is the reason you took the official attitude that you did as a member of the Board of Aldermen of Morristown? A. That was one of the reasons.

Q. Wasn't that the main reason? A. Well, I haven't gone into that very deeply. I felt I was there as an officer or member of the Board of the Town of Morristown to look after the best interests of all our citizens, which I am.

Q. Including— A. Including La Clare Welsh.

Q. And including all the other cabmen? A. Including all the others.

Q. Now, Mr. Coggeshall, did you not also at that time recommend, advise or discuss that as a means of defeating this contract between the railroad company and Welsh, Welsh's licenses should be revoked? A. Did I discuss that?

Q. Yes. A. I don't remember whether or not I discussed that.

Q. Didn't you tell Mr. Seager you would do what you could to revoke his licenses in order to prevent the operation of this contract? A. I doubt if I made any such blank statement as that. I may have said it was possibly without our power, I don't know I don't remember that.

Q. You knew that this contract was made? A. I want to say I had no feelings against Mr. Welsh because I engaged his taxicab since, I had one a month ago.

Q. It wasn't Welsh you were fighting? A. Not Welsh, not at all.

Q. It wasn't that you had anything against him or his service? A. It was the Lackawanna endeavoring to do what I consider an improper act.

Q. Isn't it true that you did say, however, that if Welsh provided half a dozen or eight or ten cars, that is additional equipment, in order to carry out his contract, you would do what you could to prevent him from getting licenses for those cars? A. I said unless we needed additional cars I didn't see why we should issue any more licenses.

REDIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Coggeshall, you were interrupted a moment ago in answering a question when you were asked if you were not in effect championing the cause of the cabmen, and you said it went further than that. You were interrupted there, what did you mean? A. Well, it went further than that. I felt in addition to looking after them if profits were to be made in running the taxicab system in the Town of Morristown, in my opinion the Town of Morristown should have received those profits not the Lackawanna Railroad, and if that additional burden was to be put on the people the town should receive it, not the Lackawanna.

Mr. English: That is all. I would like to mark for identification the police report.

Paper above referred to marked D-1 for identification.

A recess was thereupon taken until two P. M.

AFTER RECESS.

LA CLARE L. WELSH, resumed the stand:

Mr. Stallman: If your Honor please, before proceeding with the examination of this witness, I would like to call the Court's attention to and if necessary offer as exhibits for the complainant in this case the affidavits filed in the case by the individual defendants, calling your Honor's attention particularly to the opening statement of the first affidavit filed by the defendant Henry Laden, in which he says as follows: "I am one of the defendants in the bill of complaint. I am a taxicab owner and driver in the Town of Morristown. Since October 23,—"

Mr. English: Pardon me. This is on file with the Court in the case. Why read from it?

Mr. Stallman: Just to have the record at this time continuous in our proof; that is all.

Mr. English: You can't prove, I don't think an ex parte affidavit can be offered in that way. He can confront the witness with it if there is anything inconsistent in what he states on the stand. I don't know on what theory he can read it into the record.

The Court: Isn't the affidavit on file in this Court?

Mr. English: I think it is.

The Court: Part of the record in this case?

Mr. English: I think it is.

Mr. Stallman: I think one of the fundamental rules of evidence is that an admission under oath by the adverse party is always receivable in evidence.

Mr. English: As I understand it, in anything like this, counsel may be able to refer to it if it conflicts with what a witness says in his testimony, when it is proper to confront him with it. I would make no objection to that, but I don't know on what theory counsel picks out some affidavit in the file or not and reads it into this record.

The Court: I think if it is part of the record in this case counsel may refer to it.

Mr. English: Yes, but I don't think it is part of the record on a final hearing where we have the right of examination and cross examination. I have never cross examined Mr. Laden. I don't represent him. I have a right to cross examine him.

Mr. Stallman: I am not offering this as against you. I am offering it as against the defendant.

Mr. English: It is in the case and of course it affects me, and I have a right to object to it.

The Court: I think I may consider now if counsel wishes to read it he may, and if I wish to listen to it I suppose there is no real reason why I shouldn't.

Mr. English: I presume your Honor is at liberty to listen to anything you want to, but I think, at least my position is an affidavit, an ex parte affidavit on file in this file or any other file is not proper evidence on the final hearing in the case.

Mr. Stallman: The answer of these defendants is full of denials. I was only going to call your Honor's attention to that part of the affidavits filed on behalf of each of the sixteen or fifteen individuals defendants in which each

one of them says, "Since October 23, 1924, the passing of the ordinance, Exhibit C to the bill, I have parked my taxicab on the space designated in Section I of the ordinance, which is in the driveway running alongside of the easterly elevation wall and close up to said wall." The affidavit filed—

Mr. English: You are reading from part of the affidavit, not all of it.

Mr. Stallman: —on behalf of Miller Laden says, "I am one of the defendants in the bill. I have read the affidavit of Henry Laden and without repeating what he says I concur in what he says."

Now, without reading that over each time I would say to the Court that each one of these affidavits is in exactly the same language, and the affidavits are made by the defendants Francis Schmidt, Rudolph Beiser, Joseph Murphy, Daniel Murphy, Joseph Greenberg, Anson Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnell, John H. Tanner, Richard T. Burton, Joseph Grant, William Bracey, George Van Ness, all of whom in this affidavit state that they do occupy the premises of the Railroad Company mentioned in the ordinance.

Mr. English: I desire to object to the admission of this testimony on the ground that, first, the affidavits are affidavits that were filed as answering affidavits on application for preliminary injunction, and, secondly, if there are portions of them put in the entire affidavits should be admitted in evidence.

The Court: Well, I might say I am not receiving any of them in evidence. They are a

part of the record in this case because they are part of the record of proceedings filed in this case, and I have a perfect right to advert to them unless an application is made to suppress them because they are untrue. Of course if there is such an application I might hear it, but they are part of the record in the case, and I may or may not consider them, together with all the other evidence that may be adduced, so far as pertinent. I deny your motion.

Mr. English: I pray an exception.

Exception noted. Exception allowed.

Mr. English: May I ask, for my own information, if, for example, on arguing this case before your Honor may we refer to these affidavits now as part of the record before the Court?

The Court: I think they are part of the record in the cause.

Mr. English: Yes, I think they are.

The Court: I can't see any reason why you can't advert to them one way or the other.

Mr. English: They are practically making them part of the record in this hearing.

The Court: I don't understand a hearing in equity is limited to the evidence adduced.

Mr. English: I am not suggesting it is.

The Court: I think it includes the record of the proceedings before the Court plus the testimony of witnesses taken at the hearing.

Mr. English: That is what I am trying to find out. As I understand, these affidavits are a part of the record in the proceedings now before your Honor on this hearing.

The Court: I think they are part of the record in the case, and I think I must decide this case on the record of the proceedings therein.

Mr. English: So I say in our argument to your Honor we have a right to refer to these if we want to; am I right in that?

The Court: I think it is your duty.

Mr. English: Then if it is my duty I assume it is my right too.

The Court: I think a duty is a little stronger than a right. I think it is your duty because if I were sitting in a State court and there were some matter in the record that was inconsistent with my decision in the matter the Court above might reverse me because I didn't consider it even though it was not called to my attention.

Mr. English: Just following that through further, I presume the same rule would apply to the affidavits which the Town of Morristown filed.

The Court: I think so.

Mr. English: And they would be part of the case too.

Mr. Stallman: Your Honor, of course, will not preclude me from entering at an appropriate time any objection to counsel's endeavoring to prove his case without giving us an opportunity to cross examine.

The Court: I think that that is perfectly true, that you must prove your case and they must prove their defense.

Mr. Stallman: They can't prove their case by a self serving declaration.

The Court: Oh, no.

Mr. Stallman: I think all the text book writters recognize a difference between an admission made by an adverse party, and I was wondering whether Mr. English meant, now that I called his attention to an admission in the affidavit whether or not he can simply rest his case on the averments of the affidavits in his own behalf.

The Court: I don't think so at all.

Mr. Bolitho: I desire to say further that this is making one of the party defendants a witness against himself without placing him upon the witness stand and giving us an opportunity to cross examine him as to his testimony affirmatively in this case.

The Court: Well—

Mr. Bolitho: And this is an application for an injunction, as I understand.

The Court: I think this is a final hearing on an injunction.

Mr. Bolitho: Yes.

The Court: Well, I think, as they say in New York, you have my ruling; you have your exception.

Exception noted. Exception allowed.

Mr. English: May I also respectfully pray an exception, your Honor?

The Court: Yes.

Exception noted. Exception allowed.

DIRECT EXAMINATION BY MR. SEAGER:

Q. Mr. Welsh, what is your business? A. Taxicab owner, garage operator.

Q. Where do you do business? A. Morristown, New Jersey.

La Clare L. Welsh. Called by Complainant. Direct.

Q. How long have you conducted the taxicab business there? A. About twelve years.

Q. That is twelve years last past? A. Yes.

Q. You are the LaClare L. Welsh mentioned in the contract Exhibit B attached to the bill in this case? A. Yes.

Q. Now, just before that contract was made, tell the Court what the conditions were at the station with reference to taxicabs and taxicab service there.

Mr. English: If your Honor please, I think we had this up this morning, and I suppose I have your Honor's mind on it. I would like to object on the ground the bill of complaint starts with a date as of about the month of October, 1924, at which time there was in existence the contract between Welsh and the Railroad Company, and there was then an ordinance which is the subject of attack in the bill of complaint, and I myself have not been able to reconcile my mind to the idea anything back of that is material in this case. The question is evidently directed to that and a subsequent line of testimony, and I would like to object.

The Court: On the same narrow ground I received it this morning I will receive it now.

Mr. English: I understood it was to show the reasonableness of the contract with Welsh. That it does not seem to me as a material issue because we made no point in the case and don't propose to that the Railroad has not a perfect right to make a contract with Welsh or any other similarly situated cabman it choses to.

The Court: I think it must assume some duty towards the public, that is they do assume a duty towards the public, they must because it is necessary to give adequate service to and from their station. I don't know whether that is the basis upon which counsel is making the offer or not.

Mr. English: I don't know either, but my thought of the answer to that would be, the contract being in evidence as it now is in the case speaks for itself, and the bill being in the shape it is in, we would start with the time as of the date of the matter set up in the bill, and not go back into the conditions before the contract.

The Court: I think I will receive it.

Mr. English: Exception.

The Court: Yes.

Exception noted.

Exception allowed.

Mr. English: And to the subsequent line of testimony along that line.

The Court: Yes.

Exception noted.

Q. Proceed, Mr. Welsh. A. The general condition of the cars I believe to be poor. A good many were isolated, paint was bad and the condition was not as I should judge would be conducting a taxicab business. The men were not in uniform, they were in all sorts of clothes which were oftentimes hardly presentable, they congregated around the station and station grounds of the plaza. Of course they were all for themselves, soliciting and making noise and trying, making themselves heard over another one. I have seen them where a single fare

came out and if this man didn't desire to take them he would run around the side of his car so that he wouldn't come in contact with that party, waiting for a more favorable fare.

Q. What did you observe, if anything, with reference to the manoeuvering of cars for position in the line? A. They would generally take their turn as they came in, but oftentimes it would come to a close decision or one man would be away from his cab and another man would pull out while he would go to that position, and probably the other man would come back as he was backing in, and then would be the argument as to his right to jump him.

The Court: Was all this argument accompanied with peaceful language, or what were the general natures of the troubles that ensued?

The Witness: Well, the argument of the position, their right to certain stands. One would be half backed in, another would block him so he couldn't finish his proper backing. They would stand that way for some time.

Q. Now, in case the man in the premier position should be called for a passenger, what would happen with the remaining cabmen on the stand, what would take place then? A. I don't understand.

Q. When the cabman first in line was called for a passenger what would happen to the remaining cabmen on the stand? A. They would shift their cars, the next to him would move up in his place and the whole entire line would pull out half way across the road, or in different angles, and therefore back into every other about the place.

Q. Will you please answer the Court's question as to the nature of the language these men would use on an occasion you have mentioned when they were contending for place in the line? A. Well, there is a natural excited language, there was once in a while you would hear something that you wouldn't consider entirely proper, but an excited man will of course raise his voice.

Q. Now, the place where these cabs were parked was the space westerly of the shelter house entrance and between that and the underground crossing? A. Yes.

Q. Now, on the map on the easel there where you saw them men parked at that time that you speak of—

Mr. English: This map is not in evidence, your Honor, yet—

Mr. Seager: Well—

The Court: Any objection?

Q. It is westerly of the shelter house entrance? A. Yes.

The Court: Any objection to the map?

Mr. English: I don't know as there is except I would like to know a little bit about it. It apparently does not have in some of the things we know to exist, such as this tunnel or lobby that runs under the track and comes out on the east side of the elevation walls, and things like that.

Mr. Seager: The map doesn't serve the purpose you have in mind. It is a map to indicate the direction of traffic.

Mr. English: I understand that. That is obvious from looking at it. If it does not cover those matters it should not be referred to by this witness to answer that question. I have no objection to a proper map for a proper purpose, but that is a funny kind of map.

The Court: I wonder if we can't get along just as well with the map attached to the bill?

Mr. English: That is a good map to refer to. That is first rate because it has it all in.

Q. I show you, Mr. Welsh, the map which is attached to the bill of complaint in the case, and ask you if thereon is indicated the space occupied by the cabmen at the time you are referring to now? A. That is previous to—

Q. At the time you made this contract or immediately before? A. Yes, I do.

Q. And that is a space outlined in white lines immediately west of the shelter house opening? A. Yes.

Q. Or entrance. Now, how many cabs at that time were accustomed to use that space there, parking there? A. About 25, 26.

Q. Now, give us the names of the taxicab men that you saw parking cabs there?

Mr. English: Are you speaking now or before the contract, Mr. Seager?

Mr. Seager: Yes, before the contract was made.

Mr. English: This is also under my objection, as I understand, and my exception.

A. Why, Laden, Henry Laden and Millard Laden, Francis Schmidt, and Henry Smith, Rudolph

Beiser, Joseph Murphy, Daniel Murphy, Anson Durling, John Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly.

Mr. English: From what are you reading, Mr. Welsh?

The Witness: I put a few names down this noon time on a slip so that it wouldn't take so long to remember them.

Mr. English: All right.

Q. Proceed, Mr. Welsh. A. Richard Burton, Joseph Grant, William Bracey, George Van Ness. Those are the ones I thought of.

Q. How many, do you know how many licenses were issued and in effect at this time? A. I believe there were about 42.

Q. Now, we are speaking about municipal licenses. A. Yes.

Q. After the signing, at the time of the signing and execution of the contract, Exhibit B attached to the bill, what did you do in the way of carrying it out? A. You mean after the contract was signed; I went and occupied this spot westerly of the shelter house with my cars, having a starter on the westerly plaza, and the cars in the same position west of the shelter house, and they solicited the passengers, just one starter was the only one allowed in the plaza.

Q. What did you do with reference to equipment? A. I purchased upwards of ten thousand dollars' worth of new cars for that purpose.

Q. Have you a photograph there of the cars that you had ready to fulfill the contract? A. I have.

Q. With the drivers? A. Yes, sir (producing photograph).

Q. Is that a correct representation of that equipment at that time? A. It is.

Mr. Seager: I offer the photograph in evidence.

Mr. English: Did you make this photograph, Mr. Welsh?

The Witness: No, sir.

Q. You were there when it was made, weren't you, Mr. Welsh? A. I was; I am in the picture.

Q. Your likeness appears upon the face of it? A. Yes, sir.

Mr. English: You say all these taxicabs—

Mr. Seager: Wait, Mr. English, please; I am not through with my examination.

Mr. English: I thought you made an offer in evidence. I want to cross examine on the offer.

Mr. Seager: You are examining as—

Mr. English: I presume I have a right to cross examine on the offer.

Mr. Seager: I beg your pardon.

The Court: All right, sir.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Do you say the ten taxicabs in this picture are all owned by you? A. They are controlled by me.

Q. How many of them are owned by you? A. Nine.

Q. When was the picture taken? A. It was about the end of August, 1923.

Q. Are all those nine taxicabs owned by you licensed by the City of Morristown? A. No, sir.

Q. Then they are not lawfully useable for the carriage of passengers in Morristown, are they? A. Yes, sir.

Q. In the city limits of Morristown? A. No, sir.

Q. That was my question, they are not lawfully useable for the carriage of passengers within the city limits of Morristown, are they? A. Not all of them.

Q. Only those that are licensed? A. Yes.

The Court: Isn't that beyond the cross examination on this phase of the case?

Mr. English: I think, your Honor, it is; yes, it is in a sense and it is not because he offers the thing in evidence to back up his position that under this contract between himself and the Railroad he was furnishing adequate service for the citizens of Morristown.

The Court: He is offering it to show his equipment.

Mr. English: But his equipment, as I understand it, has to be limited to the citizens of Morristown.

Mr. Seager: I will show that if he will give me an opportunity.

(Question read.)

Mr. English: That is why I think it is material to show the cars he has were not capable of fulfilling his contract within the limits of the Town of Morristown.

The Court: I have not come to that phase of it yet.

Mr. English: I suppose, as far as the photograph of a row of automobiles is concerned, there is no occasion for me to dispute that. I don't make any point of that, of course, but I

do object to the admission of the photograph as a photograph of an equipment which this man has to furnish taxicab service within the limits of the Town of Morristown.

The Court: Well, I think I will receive it as a photograph taken of the automobiles which he purchased and which he was able to place upon the station plaza at Morristown, showing his ability, insofar as those cabs are concerned, to fulfill the contract. Of course he had to have licensed drivers, licensed by the State of New Jersey, and I don't know what the ordinances of Morristown are with respect to cabs. I only infer from the defendants' one witness that, as a matter of reprisal the Town of Morristown withheld licenses from this gentleman's drivers because they were interested in keeping the business for certain other men whom they had previously licensed. I don't know whether that is going to be material or not. It doesn't sound like a very sound exercise of a discretion in issuing licenses or declining to because you like somebody else better.

Mr. English: I thought what the witness said was he thought there are enough licensed cabs in the Town of Morristown now not only to take care of the traffic but to support the cabmen. Your Honor may be correct in your recollection, but I don't recollect he said he wouldn't give this man any more licenses because of a spirit of retaliation.

The Court: I may have misunderstood him. The record will correct me.

Photograph above referred to received in evidence and marked Exhibit C-22.

Continuation of DIRECT EXAMINATION BY MR. SEAGER:

Q. Now, Mr. Welsh, you have used the equipment shown in that photograph? A. Yes.

Q. In your business? A. Yes.

Q. Ever since you acquired it? A. Yes.

Q. You still have it? A. Yes.

Q. How many of the men standing alongside the cabs as shown in that picture are licensed by the State of New Jersey? A. All of them.

Q. How many are licensed by the Town of Morristown? A. Four.

Q. To conduct cab business in town; how many? A. Four.

Q. Did you apply for further licenses? A. I did.

Q. What was the result?

Mr. English: I object to that; I don't think that is at all material.

The Court: No. I think I will receive it.

Mr. English: Your Honor will allow me an exception?

Exception noted.

A. I had a letter from the Town Clerk returning the check and saying when the licenses were granted that they should pay for them at that time.

Q. Did you ever receive a license from the town, municipal license that you asked for? A. I did not.

Q. Did you apply for it a second time, a third time? A. No. The letter stood for itself; I would be notified when they were granted.

Q. You never were notified? A. No, never notified.

Q. Now, referring to the cabs other than those of which you have a municipal license for; what do you use those for? A. For passengers going to out of town points.

Q. What else did you do, if anything, in the effort to carry out the contract aside from procuring the equipment? A. Provided a starter on the plaza who was in charge of the cars, seeing that the passengers were properly taken care of.

Q. Where did you maintain the starter? A. On the plaza at the foot of the stairs; also a telephone at the lower level on the plaza.

Q. You mean you established a telephone booth there? A. Telephone booth there, yes.

Q. What did you use that for? A. For telephone service to the office and bringing additional cars if needed, and attending to the railroad's or the private, great many private people want their chauffeurs notified that they had previously came home, and so forth.

Q. Did they use your phone too? A. They did, and we called the chauffeurs that were at the station to the phone so that they could receive instructions from their own people.

Q. How did you manage the approach of your cabs to the entrance of the shelter house there to take on passengers; did you let them come anyway whatever or did you have any regulation system about it? A. They were all in line. The starter would bring one after the other as needed to the entrance to the plaza.

Q. Did you take the first one in line? A. The first one in line, yes.

Q. So that there is no backing and contention for places? A. No.

Q. Was there any loud language? A. No.

Q. Squabbling in any way permitted there? A. There was not any need of it. The starter attended to the soliciting.

Q. Immediately after you went down there on this taxicab space to carry out the contract, what happened to the other cabmen who were accustomed to park there? A. They took up a stand on the city property just beyond the railroad property on what they call Lackawanna Place.

Q. That is easterly of the shelter house entrance? A. Yes.

Q. Did they do that immediately after you went down to fulfill the contract? A. Yes.

Q. Wasn't there a notice posted there under date of January 10th addressed to these cabmen who formerly occupied the space? A. I don't get you.

Q. I am asking you, Mr. Welsh, whether immediately after you started in to perform the contract whether the other taxicab men left this stand? A. No; they did not leave the stand.

Q. What happened in that regard? A. They stayed at the same stand as they had been previously until the Chancery proceedings, I believe, or they were served with these papers that put them off.

Q. Did you see the notice posted there which was spoken of by the witness De Mott? A. I did.

Q. Now, coming to the ordinance which was introduced January, 1922, and adopted February 7th, which you certioraried— A. Yes.

Q. What did you do— that is Exhibit C-19 on the record—what did you do after that ordinance was passed, in effect? That was the ordinance which prohibited any parking on the railroad land. A. It was certioraried and it was granted, so we

stayed at the same place, the others being prohibited from coming back.

Q. But there did come a time when the Court sustained that ordinance? A. Yes.

Q. And then tell what happened to you in your parking on the railroad premises? A. Well, after one of the trains the Mayor came and announced he was the Mayor and I had about two minutes to leave the property, and had an officer there notifying me to the effect he would put me under arrest if I didn't leave, so I asked for the privilege of asking counsel's advice about it and he said he would put me under arrest if I didn't leave in two minutes, so I left.

Q. State whether or not you had heard at the time the ordinance had been upheld, at the time the Mayor was there? A. I hadn't heard anything of it at that time.

Q. From that time, that is the time when the ordinance, C-19, was upheld by the courts down to October, 1924, did you go upon the railroad premises for the purpose of parking your car and soliciting business? A. Well, there was another injunction allowed about a week or so after I was put off, which I went back again for about two months.

Q. And then what happened? A. After that I left the property and haven't been there until October 26th of this year.

Q. Now, you recall the ordinance introduced October 9th and made effective October 23, 1924, do you not? A. Yes.

Q. That is the one which is set forth in the bill of complaint in this case? A. Yes.

Q. As Exhibit C? A. Yes.

Q. In the bill in the present case? A. Yes, sir.

Q. Now, when that was made effective on the 23d of October what happened there at the station? A. Why, papers were served on—

Q. This is the ordinance, after the ordinance became effective, published on October 23d, it became effective that day? A. The hackmen came back to their position, that is their former positions; they were where my cars were supposed to stand west of the shelter house.

Q. Within the space westerly of the entrance to the shelter house? A. Yes.

Q. Where they had formerly been before you went into possession? A. Yes.

Q. Who were those cabmen who went back after the twenty-third of October, 1924? A. The ones I noticed were there were Henry Laden, Millard Laden, Joseph Murphy, Daniel Murphy, Anson Durling, John Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John Tanner, Richard Burton, Mr. Callahan, that is the son of the former Callahan, Joseph Grant, William Bracey, George Van Ness, and Mr. Powers had another driver driving for him; he was there.

Q. Did each one of the persons you have named drive a taxi on the railroad premises on that day? A. Yes, sir.

Q. Did you see those gentlemen after that on the railroad property with their cabs? A. They were there; yes, sir.

Q. What did they do with their cabs when they so drove them on the railroad property? A. They were backed against the curb soliciting business, standing on the platforms, and so forth.

Q. State whether or not you saw those gentlemen there on several days after October 23, 1924? A. I did.

Q. And state whether or not you saw them soliciting patronage of passengers of the Railroad Company on the station platform? A. I did; they were soliciting passengers, calling, each one calling and calling together for fares, trying to notify the people they were back there.

Q. Now, I will take you back, Mr. Welsh, to the meeting of the Mayor and Board of Aldermen of Morristown on the fifth of January, 1922. A. Yes, sir.

Q. 1923. Do you remember that occasion? A. I do.

Q. What occurred at that time? A. I was summoned before the Board of Aldermen—

Q. No, on January 5th, 1923; who was there, in the first place? A. Mr. Seager, counsel, appeared before the Board for the railroad, explaining their position before the Board.

Q. What was said?

Mr. English: If your Honor please, I don't know what the materiality of this is, and certainly from reading the bill there is no materiality of any proceedings before the Board of Aldermen on the fifth of January, 1923. I don't know what the purpose of the question is but I object to it because there is nothing I can see in the bill that gives any materiality in this case to what may or may not have happened before the Board of Aldermen on January 5th or any other time around that time. The only thing that is material under this bill is what happened before the Board when the ordinance in question was passed, at which time the railroad say they were there.

Mr. Seager: The testimony I hope to get from the witness has a certain bearing on the question which Mr. English himself has implied, that the witness did not have more than four taxicabs to carry passengers to and from the station.

The Court: Yes, I will allow it on that.

Mr. English: Exception.

The Court: Yes, sir.

Exception allowed.

(Question repeated.)

A. Mr. Seager addressed the Board, explaining the position—

Q. Position of the railroad you mean? A. Position of the railroad to the town, that their purpose was of establishing better service at the station and trying to explain the position so that the city would agree with him in his views, and telling of the contract as being made with myself, and stated that they desired all those that were in the business at the time to come over with me, under my direction, so that it would be one head to govern them and also that there was no remuneration to be collected for a certain period.

Q. Did Mr. Seager produce a copy of the contract at that time? A. He did produce a copy of the contract at this meeting.

Q. At the close of Mr. Seager's remarks what was said by the Mayor and the Aldermen, if anything? A. It was said that—

Q. Give the name of the person saying it in each instance. A. I believe the Mayor said that I would be left in the air where the railroad had found me.

The Court: What did you take it that he meant by that somewhat evasive statement

that you would be left in the air when the railroad had found you?

The Witness: It meant, it was my idea everything would be done against my fulfilling the contract, and that practically the contract was useless.

Q. What was said in reference to your ability to carry out the contract? A. Said that I only had the three licenses and they would be absolutely impossible to carry out the contract, and that they would refuse to grant any additional licenses, so that in that way I would be prohibited from carrying out the work.

Q. Now, since the granting of the injunction in this case, Mr. Welsh, state whether or not the Railroad Company has formulated and promulgated regulations governing vehicular traffic on the station grounds at Morristown. A. They have.

Q. I show you some printed regulations purporting to govern such traffic.

Mr. English: I object to that, your Honor, because whatever it is has arisen since the filing of the bill. I don't think matters that have come up since that date have any place in this case, there is no allegation about this in the bill whatever.

Mr. Seager: It is to show what was done and to show we are performing our duty to regulate traffic there.

Mr. English: I don't understand anything after the filing of the bill is material.

The Court: Well—

Mr. Seager: And if you will remember, if your Honor please, the injunction issued here

requires the individual defendants going upon the land of the Railroad Company to observe its rules and regulations.

The Court: Yes; I don't think there is any objection to the introduction of the rules and regulations of the Railroad Company propounded prior to the filing of the bill. I have some doubts as to whether they are evidential as against the defendants as they were promulgated subsequent to filing of the bill. I would suggest, however, that you proceed with the examination of the witness and the marking of the exhibit, and I will consider whether it is admissible or not later.

Mr. English: Mark it for identification or in evidence, which?

The Court: Let it be marked for identification.

Paper above referred to marked C-23 for identification.

Mr. Seager: Will you permit me to show these regulations have been posted and served on each individual defendant cabman?

The Court: Yes, sir, I will. I agree with you, Mr. English, I don't think it is binding on your clients, what was done subsequent to the filing of the bill. I am going to receive this now to facilitate the proof.

Mr. English: Personally I don't see if they are not binding on the party why they have any place in the case.

The Court: I don't think they have, but if there is anything that takes them back to a prior time they may be.

Mr. English: Why couldn't he ask the witness if there was anything before the filing of

the bill? That would be the most direct way, and I couldn't object, I would be precluded. Now it seems to me I have a very excellent objection.

The Court: I think so too.

Mr. Seager: Our idea is that this is merely to meet our proof of what we attempted to do in the last two years at the Morristown station, it shows what the Railroad's position has been, how it is trying to carry out its duty as a public servant. Of course, we have been unable heretofore to put a copy of it—

The Court: Well, that might bring it in; I can't tell, but I am not going to interfere with your order of proof.

Mr. Seager: Put it in subject to a motion to strike it out, is that it?

The Court: Yes, sir.

Mr. English: Well—

The Court: It is taken subject to your motion to strike out later on if it is not connected up, Mr. English.

Q. What was done with this notice marked for identification?

Mr. English: I object.

A. Posted at the station, and they were also served on the individual members and the chief of police—

Q. You mean individual— A. The taxicab men.

Q. What else was done in reference to the regulation of traffic? A. The map is here. Duplicates were also posted at the station.

Q. You mean the large blueprint? A. Yes.

Q. The map which appears upon the easel? A. Yes.

Mr. Seager: I ask that it be marked for identification, your Honor.

The Court: Yes, sir.

Mr. Seager: Under the same conditions.

Map marked C-24 for Identification.

Q. Now, Mr. Welsh, have the individual defendants obeyed the regulations? A. They have not.

Mr. English: I object.

Q. That we just marked for identification? A. They have not.

Mr. English: Wait a minute.

The Court: May I inquire now from the witness when these regulations were posted, distributed?

The Witness: Three or four, four or five days after we went back to the station, that is the 26th, along the first or second of December, along in that neighborhood. I am not positive of the exact date but—

Mr. Stallman: It was about the time we were down here upstairs on the application to modify the injunction, about that time.

The Court: Yes. Weren't the defendant cab drivers restrained from going on this property and parking their cars at that time?

Mr. English: What time is your Honor speaking of?

The Court: The time of the posting of this notice.

Mr. English: I can answer that if it was after the 19th of November, 1924, they were.

The Court: They must have been because this is some time in December.

Mr. English: Yes.

The Court: After the fifth of December. I don't see the relevancy on the issues raised by the pleadings in this case.

Mr. Seager: I won't press the inquiry further.

The Court: Well, strike them out.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Now, you told us that back in 1922 there was a number of cabmen there who congregated at the station and solicited fares in a rather unusual manner; I suppose you were as bad as any of the rest, weren't you or were you? A. During that year I was not there, that is continuously.

Q. Whenever you were there I suppose you were very orderly as compared with the rest of them, or did you try to get fares just as hard as anybody else? A. I have my drivers.

Q. Your drivers were there to get fares? A. They were not there at that time.

Q. What? A. The conditions became just previous to that so that I would not have my cars in competition.

Q. When did you enter the game then? A. After the contract was signed.

Q. Never had a cab down there before that time? A. Oh, yes.

Q. Been driving cabs twelve years in Morristown, you said. A. Yes.

Q. You had one or more cabs down there right along, didn't you? A. From July, about that year we had one cab stationed there, and—

Q. Yes, that is all anybody else had, one cab, isn't it? A. No.

Q. You have, you say, four licenses? A. Three licenses.

Q. Three licenses; no other cabman in Morristown has as many, has he? A. I don't know.

Q. Well, you are pretty familiar with the cab situation there, aren't you? A. Yes. I don't know how many have been granted.

Q. Can you name to me anybody who has as many as three licenses except yourself? A. No.

Q. You say you put in a telephone after you got this contract? A. Yes.

Q. There had been a telephone there before that, hadn't there? A. Not by me.

Q. But there was a telephone there the cabmen used? A. I believe so, yes.

Q. You took it out after you got your contract and put in your private phone? A. I gave a contract to the Telephone Company to install a telephone for me.

Q. To pull out the other telephone? A. I had nothing to do with that.

Q. Whether or not you had anything to do with it, it was pulled out?

Mr. Stallman: That is objected to as being immaterial.

The Court: Well, I suppose it was discontinued.

Q. Did you have any knowledge of the fact it was pulled out? A. Well, there had been one there

before, but I had nothing to say about taking it out.

Q. I am asking what you know; did you know the fact it was taken out? A. I know one was put in for me.

Q. That doesn't answer my question. Do you know of the fact the previous one was taken out? A. I don't, no.

Q. Don't know that.

The Court: It is not there now, is it?

The Witness: No, it isn't there now.

The Court: Then it must have been taken out.

Q. Didn't the other taxi men complain of the fact that you pulled that telephone out? A. I have no knowledge, that is I had nothing to do with taking another one out.

Q. That doesn't answer the question didn't the taxicab men complain of the fact you had taken that out?

Mr. Stallman: That seems to me to be immaterial. If he didn't have anything to do with it, the complaints they made are immaterial, too.

The Court: It will not hurt you if it is immaterial.

Q. What do you say? A. As a taxicab operator before I paid fifty cents a month as my share of the other phone.

Q. You still have not answered my question. Didn't the other taxicab men complain of the fact you had taken that telephone out? A. I didn't receive any complaints.

Q. You didn't receive it. You were complained of, weren't you? A. I don't see your point.

Q. The other taxicab men all chipped in for that telephone too? A. Yes; I paid my share.

Q. After it was taken out they lost the benefit of their fifty cents, didn't they, whatever it was? A. No.

The Court: They didn't pay their fifty cents.

The Witness: I didn't receive any money from them.

Q. Now, you remember the fact of the Chancery injunction, don't you, the New Jersey Court of Chancery? A. Yes.

Q. And that lasted from about in February of 1923 until October of 1924, didn't it? A. Yes, sir, September it was.

Q. What is that? A. September, I think it was.

Q. All right. During that time the outside taxicab men didn't go on the station properties, did they? A. No, not supposed to.

Q. Do you remember when the ordinance which you certioraried was affirmed by the Court of Appeals of New Jersey? A. I am not familiar with all the legal terms.

Q. I didn't ask you if you are familiar with legal terms; I asked you if you remember the fact, the time you knew you had lost that case, don't you? A. No, not until the Mayor ordered me away from the place.

Q. Then you found it out? A. Yes.

Q. When the Mayor gave you two minutes he was only giving you the time limited in the ordinance to drive up with a cab and unload or load up a passenger? A. The general course we pursued was for counsel to notify us.

Q. What is that? A. I wasn't notified by counsel. It wasn't done in an orderly manner.

Q. My question is—

The Court: Isn't your question directed to a construction of the ordinance?

Mr. English: Not a construction of it.

The Court: Is the testimony of this gentleman relative on what are the provisions and terms of the ordinance? My notion is it is not.

Mr. English: I don't suppose it is. I would like to cross examine him on his conversation.

The Court: That would be all right.

Q. Didn't the Mayor state to you the ordinance provided that the limit of time in which a cab could stand there was two minutes to load or unload, and if you stayed longer you would be violating the ordinance? A. That is the first knowledge I had of that.

Q. That is what the Mayor said to you? A. Yes.

Q. Incidentally you say that is the first time you knew the ordinance had been upheld? A. Yes.

Q. By the Court of Appeals? A. I hadn't been notified by anybody else.

The Court: Court of Errors, if it is a law issue.

M. English: Court of Errors and Appeals is the official title.

The Court: Yes.

Q. When the ordinance which was passed last October went through then there was made a parking place along the easterly elevation walls which there had been prior to the time of your contract, wasn't there? A. Yes.

Q. In other words, the conditions were then restored which had been in existence for about ten years before you made your contract, isn't that true? A. Yes.

Q. And back in the old days you used to park your cab there, didn't you? A. Yes.

Q. And the other men did? A. Yes.

Q. It was assumed as a matter of course that was all right in those days?

The Court: Isn't that a conclusion?

Mr. Stallman: I don't think that is binding on us.

Q. But nobody from the Railroad Company came and complained to you that you were trespassing on their property, did they? A. Not at that time.

Q. You never heard them complain to any other cabmen that they were trespassing on their property at that time? A. No. I left the service, though.

Q. When this new ordinance went through which is described in the bill of complaint then the situation was restored to what it had been as originally, wasn't it? A. Yes.

Q. The cabmen used to stand down there along that wall on the sidewalk and solicit fares, didn't they? A. Yes.

Q. And that is what you referred to, I think, when you said that they tried to notify people they were back there? A. Yes.

Q. Is that what you meant? A. Yes.

Q. They stood there alongside of their cabs, didn't they? A. Not entirely by their cars; it is generally in groups.

Q. On the sidewalk there? A. Yes.

Q. The ordinance provided they must do that, didn't it? A. Ordinance provides you have to stay in your car.

Q. You read the ordinance, didn't you? A. I am not positive.

Q. Not positive about that; all right. I want to direct your attention to the time you were before the Board of Aldermen and Mr. Seager was there, on January 5th, 1923. Who said that you would be left up in the air where the railroad had found you? A. Mayor Potts.

Q. Do you remember the Mayor said to Mr. Seager, asked Mr. Seager to sit down with him and help them prepare an ordinance that as now you would be left where the railroad found you until that could be done? A. I didn't hear that conversation.

Q. You didn't hear that? A. No.

Q. You only heard the closing part that you would be left where you were found? A. I heard what was said before the entire Board in public; I didn't hear a private conversation.

Q. Wasn't what I just quoted to you said before the Board? A. I don't know.

Q. You don't remember that. Now, you say the Board refused to grant some additional licenses to you? A. Yes; they will notify me when they were granted; they have not done it so far.

Q. They did renew the licenses you had, though, didn't they? A. Yes.

Q. Which is more than any other taxicab man in Morristown has? A. I don't know.

Q. Don't know that. You can't name anybody who has more, can you? A. No.

Q. What is the time as of which licenses are renewed in Morristown, July 20th of each year, isn't it? A. Yes.

Q. When you were before the Board on January 5, 1923, that you referred to, did you suggest the other taxicab men go over with you; is that what you said? A. Yes; I gave them the privilege of coming over.

Q. That would have lasted until July 20th when the licenses expired? A. No; I have one with me now.

Q. That was your proposition, though, wasn't it? A. No.

Q. That they go? A. It was at that time.

Q. What is that? A. It was at that time.

Q. That is what I say, it was at that time? A. I am willing to take them on now.

Q. That they go with you until July 20th? A. No, the proposition was there would be no charge until after that time.

Q. You mean ten per cent. under this contract? A. Yes; there would be no collecting of that percentage until after that time.

Q. You put up ten per cent. of your gross earnings to the Railroad? A. have not.

Q. You have not? A. I have not.

Q. They have not enforced that on you? A. No.

Q. So far? A. No.

Q. No. Going back to that suggestion of yours in January, 1923, your suggestion was that they go with you until July 20th when their licenses would expire, and after that they would be through with the taxicab business? A. Oh, no; I didn't have that in mind. That had to do absolutely with the percentage being charged.

Q. Your offer only lasted up to July 20th of that year? A. No; I have another one with me, one came over with me; he was with me until we were put off

and he is still back with me at the present time, when the offer was good.

Q. You said you were going to take them on permanently, is that your idea? A. As long as their behavior and the cars were in suitable condition.

Q. I got the impression from your earlier testimony they were a very disorderly set; why were you employing such disorderly cabmen? A. I would be glad to do it as long as they behaved themselves. I would have a right to put them off when they became disorderly.

Q. You were going to be the judge as to who was competent and who was not? A. I would have the authority; I would probably bring somebody else in, have a third party if they desired.

Q. You remember the police were down there on the station plaza prior to these injunctions, don't you? A. They generally came around half past four to quarter of five.

Q. That police regulation continued up to the time that this Court made its injunction last month, didn't it? A. They were on the platform; I never saw them go off of the platform.

Q. They were there anyway around the station plaza? A. Yes.

Q. Until the injunction in this Court dated November, 1924? A. No; they have been there since then; they were there last night.

Q. What? A. A police officer was there last night.

Q. Last night? A. Yes.

Q. Who was it? A. Officer Roth.

Mr. English: That is all.

REDIRECT EXAMINATION BY MR. SEAGER:

Q. Mr. Welsh, you were saying there were forty-six licenses, as you understood it? A. About forty-two, I believe.

Q. Municipal licenses? A. I believe so.

Q. How many were there ten years ago when you first commenced to go on the station? A. That is at the time I said there were 42.

Q. Ten years ago? A. That is the time I said there were about 42.

Q. Are there more or less at the present time? A. I wouldn't say because I don't know.

Q. Are there more taxicab men now than formerly? A. There has been two or three added the last month or two.

Q. Now, Mr. Welsh, you were testifying in answer to Mr. English that you frequented this taxicab space here, stand, ten years ago; that is way back in 1914? A. Yes.

Q. Previous to that time? A. Yes.

Q. I am asking you whether there were as many licensed taxicab men at that time as now? A. I think at the time of our first injunction, then I had a list of all.

The Court: No.

Q. No.

The Court: Mr. Seager is asking you about ten years ago and now, a comparison of the number of taxicab drivers.

The Witness: I should think there would be about the same number.

Mr. Seager: That is all.

RECROSS EXAMINATION BY MR. ENGLISH:

Q. When were those forty-two there you spoke about? A. 1922.

Q. You said earlier in your testimony there were 25 or 26 before the contract; that was in 1922? A. That were at the station; there is other places in town besides the station that are designated as taxicab stands; there is about 25 or 26 that made a practice of going at the station regularly.

The Court: Aren't there more taxicabs now in Morristown than there were ten years ago?

The Witness: I doubt it. I think there is about the same number.

Mr. Seager: That is all, Mr. Welsh.

Mr. Stallman: One thing I overlooked, if your Honor please, is the offering of the protest which we signed and served upon the Mayor and Board of Aldermen of the Town of Morristown on the 22d of October, protesting against the passage of the ordinance that night, which is marked Exhibit D in our bill of complaint, and I will ask that it be given a number in the present record.

Paper above referred to received in evidence and marked Exhibit C-25.

Mr. Stallman: The complainants rest.

FOR THE DEFENDANTS.

Mr. English: If your Honor please, in the certiorari case we took the testimony of Ex Mayor Todd of Morristown, who is physically unable to leave his home, and Mr. Stallman agreed with me, subject to any objections he

might have to relativity we could use that testimony as though the gentleman himself were here. I would like to read that to your Honor or put it in evidence so that your Honor can read it.

The Court: Why don't you put it in evidence and tell me what it amounts to?

Mr. Stallman: Before counsel proceeds to read I would like to state upon the record the objection that I made, I think, when this testimony was offered before.

Mr. English: It never has been offered before.

Mr. Stallman: Or in the Court of Chancery. The testimony merely purports to show what the then Mayor told the chief of police or certain police officers, which instructions or conversations never came to the knowledge of the Railroad Company, and for that reason any verbal instructions of that character can certainly not be binding upon the complainant in any way. I have not had a chance to read over that whole record. This testimony was taken with reference to the ordinance of 1923, which prohibited all taxicabs from coming on these station grounds, and I don't think it is material to this case.

The Court: The issues are not the same and the parties are not the same.

Mr. English: Mr. Stallman says he has not read it. What the testimony shows is that Mayor Todd was the first Mayor of Morristown after the completion of the elevation contract, and that then pursuant to an ordinance of the town he designated as a parking place the place along the track there along the easterly wall, which remained a taxicab stand for ten years until the situation was changed by

the litigation which followed the making of the Welsh contract.

In line with the answer we filed,—the Railroad by its conduct acquiesced in that situation for ten years, and the town without objection by anybody exercised its municipal functions to police the place and exercise the police powers over this public driveway.

The Court: How does that make it relevant?

Mr. English: I think it makes it relevant because it has a bearing on what you might call, what the courts call conduct evidence, as affecting the question of any damage to the railroad or any laches, which are admissible in a court of equity, or a number of elements of that kind which are always available in a court of equity, where the relief sought is largely in the discretion of the court.

The Court: Here the railroad is standing on its property rights.

Mr. English: It did that silently for ten years.

The Court: It can't lose them in ten years' time. Of course it might be relevant on a contemporaneous construction of the elevation contract.

Mr. English: I think it is.

The Court: I think that is about the only purpose it would be admissible for, and I don't think even that can do away with the plainly expressed provision. Of course it is not admissible in evidence at all except by consent. It is testimony not given where the issues are the same.

Mr. English: I understand that, and Mr. Stallman waives that, but he makes the objection it is not material.

Mr. Stallman: I agree with Mr. English that if Mr. Todd could come down he would have testified to this effect, but subject to the objections I might raise to its materiality and its competency. That is the only objection. I don't want to take advantage of the fact Mr. Todd cannot be called.

Mr. English: I think it is competent and relevant and material on the question of the practical construction of this elevation contract by the parties.

The Court: It strikes me probably it is material for that, quite competent for that. Suppose we take that and allow Mr. Stallman an exception.

Mr. Stallman: Exception.

Exception noted.

Mr. Stallman: Just in further explanation of that, I want to ask your Honor to note particularly that when Mr. English says that the Mayor pursuant to an ordinance designated that property as a taxicab stand, it was admitted in the testimony by the Mayor that that was done not by any order in any documentary way, it was merely verbal instruction to the chief of police, and there was no proof it ever came to the attention of the Railroad Company that the taxicab men in going down there were acting under a designation by the Mayor. I wanted to call your Honor's attention to that.

Mr. English: The testimony covers that. I won't read every word of it. He was mayor from January 1, 1913, to January 1, 1915; he knew the elevation contract and the completion of the work under it, and that under the authority of an ordinance of the Town of Morristown, approved July 16, 1878, he designate a hack stand on the station grounds.

Right there in his testimony we put in evidence the ordinance of 1878, and I can give your Honor the material part of it.

The Court: I know the general nature of ordinances of that kind.

Mr. English: It says the Mayor is authorized to designate such place—

The Court: Yes. Did the Lackawanna Railroad receive notice?

Mr. English: The Mayor doesn't say they received any specific notice. Of course they knew of the physical fact that the hack stand had been designated and the hacks were parked there.

The Court: How was this hack stand marked; was it marked in any way physically, any physical markings?

Mr. English: "Did you designate any other stand? A. I did, on the opposite side, the east side, so-called, just opposite the railroad station. First, that did not work out satisfactorily, making a confusion and congestion of traffic. I abolished the stand opposite, and made a new stand alongside of the station, between the express office and the entrance."

That is along in there (indicating); I showed him the blueprint which is annexed to the bill of complaint now.

Mr. Stallman: Read that, keep right on.

Mr. English: "By the side of the station, you mean where? A. Right up against the sidewalk. Q. Which runs along the— A. Yes.

"Mr. Stallman: May I inquire whether these designations were made in any official way in writing?

"The Witness: They were not, sir; it wasn't the custom, in those days, to put them in writing.

"Q. I show you a blueprint, entitled 'Station Grounds at Morristown, N. J., which outlines in yellow what we call the station plaza.

"Mr. Stallman: I think, Mr. English, that your interpretation of the yellow lines is a little incorrect. The yellow lines are intended to show the boundary of all of the property of the railroad company, and includes property which cannot be designated as plaza.

"Mr. English: I will accept the correction in my statement, but it does, incidentally, include the station plaza.

"Mr. Stallman: Exactly.

"Q. I call your attention to this map and point out to you the driveway on the west side of the station, which you just mentioned as having designated cab stands; there appear to be two places outlined in green here—do they indicate about where you designated the cab stands? A. Yes.

"Q. On the east side of the track there is outlined in green, on this map, along the driveway by the easterly wall, between the entrance to the passenger tunnel and the express office, a parking place; is that the place which you designated on the easterly wall? A. Yes. That is the one your Honor is familiar with.

"Q. That, as I understand it, is the second designation you made on the easterly side of the track? A. That is correct.

"Q. Can you indicate on this map where you made the first designation? A. It was directly opposite the green designation.

"Q. Along what was designated on this map 'Concrete Walk' by the flower bed? A. There is a little triangular park.

That is the thing he is talking about up there (indicating). First he says it was along here and it didn't work, and they put it along there where it has been ever since (indicating).

"Q. You said, in answer to Mr. Stallman's question, that this designation was not in writing. Was it called to the attention of anybody in the city government; the police department, for example? A. The police were notified.

"Q. And were any instructions given to them to enforce this regulation or ordinance? A. They were instructed.

"Q. And to your knowledge did they enforce it? A. They did.

"Q. So that during your term as mayor all cabs were required to park at the place you outlined on this station plaza? A. Yes."

Then he goes on and talks about the instructions he gave to the police, sending them down there to see the thing was followed up and that they did that, and he had knowledge of that fact.

Mr. Stallman: I have no particular objection to your Honor's reading that testimony. It is admitted that he told the policemen what they were to do. There were no instructions—or any communications with the railroad company whatsoever.

Mr. English: I will offer in evidence the testimony of John J. Todd, former mayor of Morristown as it appears in the printed book in the certiorari case, Welsh vs. The Town of Morristown, in the New Jersey Supreme Court.

The Court: All right.

Mr. English: In that connection I ought to offer in evidence the ordinance of the town as found in the printed book of ordinances, which was adopted in July of 1878, particularly the 14th section, which says that the mayor is hereby authorized to designate such places within the Town of Morristown as public stands for hacks, omnibuses, stages and carriages, and other licensed vehicles as he may deem expedient and proper, and made such regulations, etc., at the public hack stands or at the railroad stations or elsewhere as may be necessary to preserve order, and he says it was pursuant to that statute he acted.

Papers referred to above received in evidence and marked exhibits D-2 and D-3, respectively.

DAVID F. BARKMAN, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Barkman, you are a member of the Bar, aren't you? A. Yes, sir.

Q. You live in Morristown? A. Yes, sir.

Q. You are a former Mayor? A. Yes, sir.

Q. When? A. Four years, 1920, 1921 and 1922.

Q. At the time you were Mayor had the elevation work been completed? A. Oh, yes.

Q. It was in working order like it is now? A. Yes, sir.

Q. What was the fact with reference to the town's policing the station down there? A. A number of police visited the station several times a day.

Q And regulated the traffic down there? A. For all purposes.

Mr. Stallman: That is rather leading.

Q. Where did the public cabs park on the east side of the station? A. That is the parking stand in controversy at the present time.

Q. I am asking you where, back in those days. A. On the east side north of the entrance to the station, on the east side towards the express station.

Q. Do you know whether that is the same place designated in the ordinance passed last October, and which is the subject matter of this suit? A. I haven't seen that ordinance but I believe it is.

Q. Was there any objection by the Railroad Company to either the parking place or the activity of the police department down there? A. None made to me personally.

Q. Did you hear of any? A. I never heard of any until the latter end of twenty—

Q. When the present controversy arose? A. Yes; 1922.

Q. The latter part of 1922? A. Yes.

Q. Were you mayor at the beginning of that controversy? A. Yes, sir.

Q. Then you ended your term of service? A. January 1, 1923.

Q. January 1, 1923, and then Mr. Potts became Mayor? A. Yes.

Mr. English: That is all.

CROSS EXAMINATION BY MR. SEAGER:

Q. Do you remember an occasion in October of 1922 when a representative of the Delaware, Lackawanna & Western Railroad Company called upon you with reference to the taxicab situation? A. I do.

Q. Will you please look at this gentleman and say whether or not he called upon you (indicating)? A. Yes; I know.

Q. In October, October 19, 1922? A. Mr. Bray called on me; I don't know whether or not that was the date.

Q. What did he say to you on that visit? A. I can only give you a general outline of what the conversation was about, but it related to the change of the taxi stand at this railroad station.

Q. He advised you, didn't he, there was to be a change in the situation as to taxicabs at the station there? A. He said the Railroad Company, as I understand it, were considering a change, putting it somewhat under the same system they had at Newark.

Q. What did you understand that system to be? A. I don't know as I understood anything about that except cars probably all one color, and perhaps drivers in uniform, something like that.

Q. Didn't he tell you the railroad contemplated putting the cabmen under the control of one man, head? A. I can't remember that as a fact, but I assume that he did say something to that effect.

Q. Didn't he tell you on that day the Railroad Company intended to make a contract with the residents of Morristown for the purpose of controlling the taxicab situation at the station there? A. I won't say whether or not he did, but I understood that was their plan, either—

Q. You understood that was the purpose of the Railroad Company at that time? A. Something like that; yes, sir.

Q. Didn't he explain to you at that time the Railroad Company considered the situation unbearable at the station? A. Well, if he did I don't think he put it quite as broad as that, and I remember that I objected to the statement to that effect, that in the three years or almost four years I had been Mayor we had had no official complaint against our men to any great extent.

Q. Then there must have been some assertion from him to that effect? A. I say he may have said that but I remember distinctly telling him so far as the town was concerned we had not any official knowledge of that and if he had such knowledge he should present it to the town officials.

Q. You don't agree with some of the assertions made this morning that this proposition to arrange the taxicab situation by making an expensive contract was suddenly sprung upon the town? A. I think it was; that is the first I heard of it.

Q. You admitted in October a representative of the Railroad Company came and told you they intended to do it. A. They hadn't decided to do it; they never set forth their intentions and policy further; since you asked about the conversation, I objected to Mr. Bray, to the Railroad taking that action without going into the legal aspects of the question, what their rights or what the town's rights were, bringing on a situation of that sort at the beginning of winter was a very bad thing to do, because these men had built up their business and would have very little to do in the winter, and I suggested if they were thinking of making changes that they defer their action until a more favorable

time, and after that I didn't hear anything more about it, I don't think, for two months, almost the first of January.

Q. The thing in your mind at that time during that visit was these so-called independent taxicab men would be thrown out of a job in the winter? A. That was one of the aspects of their plan, that would result from putting their plan into effect, yes.

Q. You felt that would not be quite fair, inasmuch as the town had licensed the taxicab men and their licenses were to run until July? A. They were to run until July and we felt we had some sort of duty to perform toward the taxicab drivers because they had a license from us; also I thought we had some sort of duty to perform to the traveling public and also the railroad. There were three elements that entered into the situation, and I don't think it could be determined in a very few moments of time, or very little time.

Q. Didn't you tell Mr. Bray you agreed with the Railroad's position, it would be better all around to have one reliable man to handle all the taxicabs? A. I don't remember saying any such thing.

Q. Can you say you did or didn't? A. I will say I didn't.

Q. You didn't say any such thing? A. No.

Q. Or anything in substance or effect like that? A. I don't know about that.

Mr. Seager: That is all.

Mr. English: That is all, Mayor.

CLYDE POTTS, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Potts, you are the present Mayor of Morristown? A. I am.

Q. Have been how long? A. Two years the first of January.

Q. You began on January 1, 1922? A. Yes, sir.

Q. How long have you been a citizen of Morristown? A. About eighteen years.

Q. You are pretty familiar with the Lackawanna station at Morristown? A. I am; yes, sir.

Q. You can remember the situation before the elevation, I suppose? A. Yes, sir.

Q. And since? A. Yes.

Q. Now, to your knowledge following the completion of the elevation work where did the taxicabs, public taxicabs, park, on the east side of the tracks, north side I guess would be more accurate. A. East side, I guess.

Q. The tracks run east and west, north and south, all right; on the east side of the tracks? A. They first parked on the, across the plaza from the shelter house on the sidewalk there, and then later they were changed to the westerly side of the plaza, backing up against the sidewalk under the abutment wall.

Q. That is the easterly wall? A. Yes, sir, to the place that is in controversy in this case.

Q. Do you know how long that continued along that easterly wall? A. Oh, it continued there until some time in January of 1913 when the injunction granted by Vice Chancellor Foster was served on the town and the cabmen.

Q. Now, are you generally familiar with conditions down there before the first of January, 1923, with respect to the congregating of cabmen and what not? A. I was, yes, sir.

Q. How was it? A. Conditions were no different there prior to January 1, 1923, than they are in any other public taxicab stand. The cabmen lined up there backed against the sidewalk and on the whole it was about the same class of taxicab service you would find in any municipality like Morristown, or perhaps better than the average. The men were orderly, I never saw anything out of the way there that one could take exception to.

Q. I think your office is in New York? A. Yes, sir.

Q. You commute on the railroad, do you? A. I commute, of course, every day between Morristown and New York.

Q. You remember, of course, the fact the New Jersey Court of Chancery granted an injunction restraining the cabmen from going on the station grounds? A. Yes, sir, I do.

Q. Following the making of that injunction where did the cabmen park their cars; what was done with respect to that? A. The police committee of the Board of Aldermen and myself, as Mayor, moved the licensed cabmen on to Lackawanna Place, a few hundred feet south from the shelter house on the east side of the elevation.

Q. Yes, now, how did that work out in practice with respect to the convenience of the traveling public? A. It provided a place for the hackmen to stand while they were waiting for their fares, but it was not convenient for the traveling public.

Q. What was the difficulty? A. Well, it was quite some distance removed from the shelter house,

and in snowy or rainy weather it was very difficult and inconvenient for the people to reach these public hacks. They had to walk through snow and slush, and it was farther away, and besides that it is not in direct vision from the shelter house. Strangers coming to town couldn't see the hacks standing there as well as they could at the place they occupied for ten or twelve years.

Q. Now, have the municipal authorities of Morristown given any study to this question of traffic conditions on that side of the railroad track at the station? A. I believe they had prior to my coming in; I understand from the chief of police it had been given a good deal of study. I know that after I came in—

Q. I mean after you came in. A. —office in January 1, 1923, we gave a great deal of study to the traffic situation at the depot, particularly in view of this controversy, as you might call it, which sprung up there. It was necessary for us to make quite a detailed study of the situation and see if we could find some solution.

Q. Did you personally devote some time to that study? A. A great deal of study.

Q. Who else did? A. Mr. Hicks did the first year, chairman of the police committee, and Mr. Ledgerwood gave a great deal of time to the study of the question.

Q. Do you know whether the chief of police paid any attention to it? A. The chief of police was always studying the question.

Q. Conferring, I suppose, with the members of the Board? A. Yes, sir.

Q. Now, it appears in the case that on October 7, 1924, the injunction which had been previously in existence out of the Court of Chancery in New Jer-

sey was dissolved by the dismissal of the bill in that suit. What then did the town authorities do with respect to the traffic condition on this east side of the railroad? A. Well, after we found out that we had power to regulate foot and vehicular traffic on the plaza—

Q. Let me interrupt you, how did you find out you had that power? A. We were notified by our attorneys that the Court of Errors and Appeals of the State had upheld the right of the town under its contract with the Delaware, Lackawanna & Western Railroad Company to exercise police powers over the foot and vehicular traffic on the plaza.

Q. Is that in connection with the Welsh certiorari case that has been mentioned? A. Yes, the Welsh certiorari case.

Q. Having learned of that what did you do following the lifting of that Chancery injunction? A. The police committee had a conference and decided after 14 or 15 months of trial with the cab stand on Lackawanna Place it was not as desirable a place to have the cabs stand while they were waiting for their fares, that it was inconvenient to the traveling public, and in rainy and bad weather it constituted a menace to their health, and therefore they recommended to the Board that the taxicab stand be moved back to the place it had occupied for some ten or twelve years, and recommended the passage of an ordinance fixing that as a stand where the cabs waiting for fares could wait.

Q. Now, do you know whether the police committee embodied their views in a written report? A. They did; yes, sir.

Q. I show you D-1 for identification; is that the report which was submitted to the Mayor and

Board of Aldermen of the Town of Morristown (indicating)? A. It is.

Q. That speaks of a petition of commuters; do you know of that fact? A. Yes, sir; there was a petition filed with the Board of Aldermen purporting to be signed by commuters of the Delaware, Lackawanna & Western Railroad Company, asking that the cab stand be moved back to the place it formerly occupied.

Q. Do you know how many signed that petition?

Mr. Stallman: I think I should object to this; there is no proof whether the signatures are bona fide or how they were obtained. In any event, it does not seem to me to be material on the issues of the case, it is not binding on us in any way.

Mr. English: It is in the answer, and I think it goes to the question your Honor permitted of the reasonableness of the regulations down there. Your Honor will remember you admitted testimony this morning, as your Honor expressed it, to show the reasonableness of the regulations with respect to the making of the Welsh contract. I think what is reasonable on one side is on the other side, and I want to show the situation here with respect to the welfare of the traveling public, which, of course, is the first concern of the municipal authorities.

The Court: What about the point Mr. Stallman makes that there is nothing to show who signed it?

Mr. English: I have not offered the petition in evidence. I merely asked the witness in view of the fact the report recites the petition, if he

knew of that fact; he said he did and it had been signed by 314 people.

Mr. Stallman: It doesn't seem to me the materiality of evidence is affected by the subtlety with which it is admitted or introduced. I object to the record showing the alleged petition or any action the Mayor may have taken in connection with it.

The Court: I think I will allow it and allow an exception.

Mr. Stallman: Very well.

Exception noted.

Mr. English: I am not offering the petition; I don't suppose we could furnish legal proof of every signature.

(Question read). How many did sign it? A. More than 300.

Q. More than 300.

Mr. Stallman: That is a mere assumption on the part of the witness.

The Court: It goes to the weight of his testimony, but this gentleman is mayor of this town, and the petition is presented to him and it is purported to be signed by 314.

Mr. English: Yes, sir.

The Court: They act upon it.

Mr. English: That is the point.

Q. Now, was this report, D-1 for identification, filed in the municipal records and any action taken on it? A. It was read at the meeting of the Board of Aldermen.

Q. Yes. A. It was—

Q. I see it refers to an ordinance which the committee submitted with its report; do you remember that fact? A. Yes, sir.

Q. And that ordinance was adopted? A. Ordinance was submitted with this report and was read I believe at a subsequent meeting after this report was received and adopted at that time.

Q. And that ordinance is the same ordinance which is set forth in the bill of complaint in this suit, is that correct? A. It is.

Mr. English: I offer in evidence the report which is annexed to the affidavits which were filed on behalf of the defendant town on the preliminary injunction.

Mr. Stallman: I desire to object to the admission of the report, on the ground it is merely a self-serving declaration. I don't think the officials of the town of Morristown can make evidence themselves in making this report and offering it as evidence. There is apparently no way in which we can cross examine on any facts set forth in it, and if it sets forth any facts which the counsel may deem relevant it seems to me they can produce the witnesses to testify to those facts and we can cross examine them. As it stands I think it violates all rules of evidence to admit this kind of paper.

The Court: I think there is some force in that.

Mr. English: One difficulty with my friend is, your Honor, that this is a part of the affidavits which are filed in the case, and he presented the question about the use of these affidavits. Your Honor ruled they should be made a part of the record.

The Court: No; that is not my ruling at all. My ruling is that they are part of the record in the case. You can't take them out of it.

Mr. English: If they are in they are in.

Mr. Stallman: It is part of the record, but I don't know of any rule that permits the pleadings to go in on the face of them without proof.

The Court: Mr. Stallman's objection is to the admission in evidence of this self-serving declaration as evidence, and I think that objection is well taken.

Mr. English: Your Honor, it is really part and parcel of the ordinance which is made part of their case in their bill of complaint.

The Court: If it is part and parcel of the ordinance it can be proved as part and parcel of the ordinance.

Mr. English: I thought I had proved that by proving by the Mayor this report was presented, with which was included the ordinance which was subsequently adopted.

The Court: Yes, but I don't think we can admit the report in evidence. I know of no rule by which a report can be received in evidence.

Mr. English: It is a part of the municipal records in connection with this ordinance which is under attack here. We are called on by this petition to defend our ordinance.

The Court: Therefore the report is not necessary at all.

Mr. English: The passing of the ordinance grew out of the making of the report.

The Court: Exactly.

Mr. English: So it is part and parcel of the proceeding.

The Court: I don't think so. I don't think a committee report of Congress is part and parcel of the act which is subsequently enacted.

Mr. English: That is a different thing.

The Court: It is the municipality.

Mr. English: We are in court now, your Honor, and we are asked to defend an ordinance which is attacked practically on the ground it is unreasonable and interferes with their vested rights, and in defense of ourselves we present, among other things, the preliminary report which preceded the passing of the ordinance.

The Court: I am not precluding you from showing the reasonableness of your act by testimony, but I know of no principle of law by which you can offer the report in evidence.

Mr. English: There is not any formal offer on the record. With your Honor's permission I offer in evidence the report of the committee of the Board of Aldermen which has been identified by the witness, and which was previously marked D-1 for identification, and which is the same report as is referred to in the affidavits of the defendant filed in this case in opposition to the application for preliminary injunction.

The Court: Yes, sir; I exclude it and you may have an exception.

Mr. English: Your Honor will allow me an exception.

Exception noted.

Exception allowed.

Q. Now, Mayor, from your personal observation on the station grounds there and also from reports submitted to you by the police and other municipal

officers submitted to you as Mayor of the town, where do you say is the most effective place for the location of a public hack stand on the north side of the railroad tracks in that vicinity? A. East side.

Mr. Stallman: Just a minute.

The Court: Objection sustained.

Mr. English: Your Honor will allow me an exception.

Exception noted.

Q. Where in the judgment of the municipal authorities of the Town of Morristown is the most effective and beneficial place from the standpoint of the public welfare for the establishment of a public hack stand on the east side of the Lackawanna tracks at the station?

Mr. Stallman: We object to that question if the Court please, on the ground that the opinion of this witness on the subject is irrelevant and immaterial, and incompetent, and certainly cannot be binding upon this Company in the question of right and control of its own property.

Mr. English: I think it is competent to express the judgment of the municipal authorities, if that is the objection.

The Court: The municipality has established by its ordinance a hack stand. That is a fact. We know exactly where it was. I suppose in the exercise of their judgment they chose the best place, I don't know, but I don't think this gentleman can testify as to that. He may show why they chose that place. That would be material.

Mr. English: I pray an exception.
Exception noted.
Exception allowed.

Q. Why did the municipality pass the ordinance which is set up in the bill of complaint establishing a public hack stand at the place they did establish it in that ordinance, on the east side of the elevation wall?

Mr. Stallman: You mean by that, Mr. English, what was the reason for selecting the location or what was the reason for passing an ordinance establishing a taxicab stand at all?

Mr. English: There is my question; you may interpret it as you please.

The Court: I think it is capable of a dual aspect. I think it may be revelant for this witness to show the reasons why that particular location was selected, but I don't think it is relevant for him to show the motives underlying the passage of the ordinance.

Mr. English: I ask it in its most relevant sense.

The Court: Limiting your answer, Mr. Witness, tell the reasons why that particular location was selected.

Q. Do you understand?

The Witness: Is it all right to answer, Judge?

The Court: Yes.

A. Why, I think the Board of Aldermen, I know the Board of Aldermen, including myself, was ani-

mated by a desire to establish a hack stand where it would do the greatest good to the people in Morristown who use the Lackawanna Railroad for commuting to and from New York, and after canvassing the entire situation thoroughly, after being advised by the attorneys of the town as to the rights of the Town of Morristown in the premises the Board fixed upon the site chosen as a stand where the cabs waiting for their fares might rest. I think they were governed in this site a great deal by the advice of the police committee, and the report which was submitted with the ordinance, and also upon the observations of each individual member of the Board on the condition at the railroad station. At least four members of the Board are commuters to and from New York. All of us use the station a great deal, and during the two years we have had this matter under observation we have had an opportunity of studying the situation there so as to inform ourselves as to what arrangement at the station would best serve the traveling public, and the ordinance in question we believe designated that site.

Q. Mayor, the thirteenth paragraph of the bill of complaint charges that the Town of Morristown did not pass this ordinance in good faith but adopted it and passed it in bad faith, for the purpose of harrassing and embarrissing the complainant; what do you say to that? A. I do not believe it is true.

Q. You have already told us why they did pass the ordinance. A. Why we passed it?

Q. Yes; I say you have told us that. A. Yes; we passed it because we thought it would serve the public the best.

Q. Was that judgment based on experience from having had parking places at other locations there?

Mr. Stallman: That is not only leading but calls for a conclusion.

Mr. English: I can readily reframe the question.

The Court: Hasn't he already testified that from observation, from experience the location seemed the most convenient to serve the traveling public in the community?

Mr. English: Maybe I didn't catch the word "experience" in his answer. That is why I asked him.

The Court: He has dilated on the fact that the members of the committee were commuters and that they observed the needs of not only themselves but other travelers at the station going to and from Morristown.

Q. Mayor, you have from your familiarity with the location of the station particularly on the east side of the elevation wall—

The Court: May I make an inquiry? Isn't this place where the cab stand is established under the ordinance the same location where the Lackawanna Railroad Company stationed the gentleman having the exclusive contract under their arrangement with him?

Mr. English: You mean isn't it on the—

The Court: Isn't it the same location?

Mr. Stallman: Yes; that is right, your Honor.

Mr. English: I didn't catch that.

The Court: I understand the location for the cab stand fixed by the ordinance, this last ordinance, is the same location as that fixed by the Lackawanna Railroad in their contract

with the gentleman having the exclusive agency.

Mr. English: I don't remember any place was fixed in the contract.

The Court: Maybe it is not fixed in the contract, but it is the same place shown in this picture, whatever it is.

The Witness: No, not in that picture.

Mr. English: That is on the other side of the track.

The Court: That is on the other side of the track. All right.

Mr. English: It is the same place that used to be the parking place, if that is what your Honor means. I don't think, in fact I am pretty sure this contract with Welsh doesn't fix any particular place.

Mr. Stallman: There isn't the slightest doubt about it.

Mr. English: What is your Honor's question?

The Court: That the cab stand established by the municipality after the decision of the Court of Appeals was the same location as the place designated in the contract of the Railroad Company with Welsh.

Mr. English: Outlined in green on the map attached to the contract, I think it is. That is the same place which existed there for the ten years following the completion of the contract before the controversy in question began.

The Court: The ordinance designates the same location as is designated in the contract with Welsh as a place for taxicabs to stand. The ordinance, however, designates about twice

as much space, designates a space from the tunnel—

Mr. English: Entrance to the tunnel.

The Court: —entrance to the tunnel to—

Mr. English: You had better put that in the language of the ordinance, your Honor.

Mr. Stallman: Section 1 of the ordinance provides that part of the westerly side of the driveway on the east side of the shelter house of the Delaware, Lackawanna & Western Railroad in Morristown, extending from the northerly side of the entrance way to the shelter house or tunnel under the depot northerly along the curb to the turn of said driveway under the railroad is hereby designated and established as an additional public hack stand.

Mr. English: That includes that part of the same place that was mentioned in the Welsh contract.

I have lost what we were asking the witness.

The Court: It was as to the reasonableness of it for a public hack stand, that is the adaptability of it as a public hack stand.

Q. I understand you to say experience showed that was the best place for a hack stand; it worked out best, is that right? A. Yes, sir, that was the result of observation and experience there.

Q. Since the Court has made its injunction in this present suit what has become of the taxicab men other than Welsh?

Mr. Stallman: Doesn't the Court think anything that has transpired after the injunction is signed is immaterial in this case?

The Court: I think it probably is immaterial, I don't know.

Mr. English: Well, that is true except, I think, bearing now on the general situation of the station.

The Court: It strikes me what we really have to decide in this case is the right of the Lackawanna Railroad Company to regulate traffic on their own lands, if this be their own lands over which they have the powers of an ordinary owner.

Mr. English: Yes, sir.

The Court: I don't really see how this is going to be material on that question.

Mr. English: I will ask him another question.

Q. From your knowledge of the situation down there Lackawanna Place starts on the south of station and Morris Street and runs towards the north, does it not? A. Yes, sir.

Q. When it gets to that place, which is physically the lands of the Railroad Company, is there any change in the layout of the street? A. No, sir; it is difficult to tell where Lackawanna Place ends and where this so-called roadway or plaza begins.

Q. And then that driveway on the station property which is a physical continuation of Lackawanna Place goes up and curves under the tracks to the west and again joins Morris Street; does it not? A. Yes, sir, and turn to the right to the Erie depot.

Q. When it turns to the right where does it run to? A. To the Erie depot.

Q. Where is Saw Mill Lane? A. Saw Mill Lane begins on the so-called plaza and runs up to the

Erie depot. Saw Mill Lane formerly continued in a southeasterly direction across under the present station grounds of the Delaware, Lackawanna & Western Railroad into Morris Avenue, but under the contract with the Delaware, Lackawanna & Western Railroad Company Saw Mill Lane was abandoned for that stretch, and this other highway substituted in lieu thereof.

Mr. Stallman: I object to that as a conclusion of law. It is a statement of law this witness is not competent to make.

Mr. English: He knows the contract, and the contract is in evidence.

Mr. Stallman: I move to strike out his statement about the disposition of these streets because that surely must be shown in some other way than just what this witness thinks about it.

The Court: Mr. Witness, the disposition of the streets as they formerly existed was controlled by the elevation contract between the Lackawanna and the city; is that not true?

The Witness: Yes, sir; that is my understanding, Judge, of the situation there.

The Court: Then I will strike out what the witness may have said as to what happened under this contract and leave that to the language of the contract to show. Of course so much of his testimony as to what previously existed, that Saw Mill Lane ran through to Morris Street I think is relevant.

Mr. English: Can't he show what was done as a result of the contract?

The Court: Yes, sir; he can do that.

Q. Now, just describe how Saw Mill Lane entered Morris Street before the contract and the elevation under it. A. Saw Mill Lane began on Morris Street, about opposite King Street, and went in a northeasterly direction.

Mr. English: I will show the witness a larger map, if your Honor will let me, which is the duplicate of the map annexed to the elevation contract.

Q. You are looking at the map annexed to the bill of complaint? A. Yes, sir. Saw Mill Lane left Morris Street at a point opposite King Street and went in a northeasterly direction till it joined with the Saw Mill Lane that is shown at present on this map; in other words, Saw Mill Lane was formerly almost a straight continuation from its present position to Morris Street and ran under the tracks and the platform and the yard of the present D., L. & W. Station grounds.

Q. Since the contract has been carried out what has happened? A. Since the contract has been carried out a new highway was provided which left Morris Street possibly 100 feet farther up Morris Street towards town.

Q. North? A. Northerly, yes, and leaves Morris Street at right angles until it strikes the tracks of the Delaware, Lackawanna & Western Railroad Company, and then it crosses under the tracks of the Delaware, Lackawanna & Western Railroad Company at right angles to the axis of the tracks. After passing the tracks the highway turns at right angles and comes down along past the shelter house and joins Lackawanna Place.

Mr. Stallman: I move to strike out the entire answer on the ground the statement of the witness a new highway was laid out and extended, as the witness stated, is a conclusion of law and is contrary to the contract we have under discussion.

The Court: I think the language of the witness in so much as he designates the way as a highway must be stricken out, but it may stand insofar as he designates it as a way laid out.

Mr. English: The map calls it a driveway.

The Court: Well, a way or a driveway.

Q. Now, is Saw Mill Lane used at the present time? A. It is, yes, sir.

Q. For what purpose? A. Used—

Mr. Stallman: I object to the question, if your Honor please, because there is nothing in the pleadings in this case that has the slightest reference or bearing on Saw Mill Lane.

The Court: Let me ask this question and see whether you object to it, and whether Mr. English wants more. Do people live on Saw Mill Lane, that portion of it which is left?

The Witness: Not that I know of.

The Court: Are there business houses along Saw Mill Lane?

The Witness: Yes, sir, the beef house and the Morristown and Erie depot are over in there, and it has a lumber yard over in there.

The Court: Do you want to strike that out, Mr. Stallman?

Mr. Stallman: Your Honor just asked for a matter of information, no, but I object to the question about Saw Mill Lane because what-

ever rights there may be in people who have any property along Saw Mill Lane they are purely private rights. There is no proof or no presumption that Saw Mill Lane ever was a public street. If there are any rights up there they haven't anything to do with the question of the right of the Town of Morristown to establish a hack stand on our property.

The Court: Well, of course again we come back to the construction of this contract.

Mr. English: Yes; that is why I am putting in this evidence.

The Court: But I think I will let this testimony stand that there are persons having places of business still along Saw Mill Lane, that is a packing house, a lumber yard and the Erie station.

Mr. English: Now, to meet Mr. Stallman's objection of lack of proof of Saw Mill Lane being a public road, I offer in evidence from the official publication of the ordinances of Morristown, particularly page 178, the following, "Saw Mill Lane. An ordinance to adopt the survey and map of Saw Mill Lane and to provide for the filing and recording of said survey, passed May 16, 1882, book E, page 433."

Mr. Stallman: I object to that because there is nothing to show where this street that counsel is referring to extends from or to.

Mr. English: He has told you. It is already in the witness' evidence.

Mr. Stallman: I object to counsel's indulging in so many assumptions. Now, as a matter of fact—

The Court: Wait a minute. I think if you want to prove Saw Mill Lane a public highway

you have got to show dedication for public user for the prescriptive period.

Mr. English: I propose to do both.

The Court: And I think that requires an exact designation of the way.

Mr. Stallman: There was so much doubt about Saw Mill Lane when we made this contract, and I speak with authority because I drew this contract and take the responsibility for it, and in that contract we sat down with—I don't know whether any of the gentlemen are here—we put in this contract that the town shall vacate Saw Mill Lane from its intersection of Morris Street to its northerly terminus, or so much of between said points as now exists as a public street or highway. Nobody knew whether or not it was a public street or highway.

I object to counsel's assuming and trying to railroad this thing through as a public street.

Mr. English: There is in evidence a deed, C-13, put in by my friend. It conveys, the Morristown & Erie Railroad Company conveyed to the Morris & Essex Railroad Company a strip of land known as Saw Mill Lane, "formerly leading into Caskey's Mill through the property of The Morris & Essex Railroad Company, from the Northeasterly line of Morris Street to the Southerly side of a private driveway, distant about Four Hundred Eighty (480) feet Northeasterly from the aforesaid Northeasterly line of Morris Street, said Lane being Nineteen and eight tenths (19.8) feet in width and being in two parcels containing Five thousand three hundred eighty-five (5,385) and Two thousand two hundred eighty-seven (2,287) square feet

of land more or less, respectively, all as shown in Yellow tint on Blue Print hereto attached and hereby made a part of this description.

"Subject however, to any rights or right of passage thereon which may exist in favor of C. W. Ennis & Company, and the Swift Beef Company, and to the rights of the Town of Morristown, and The Morris & Essex Railroad Company, and any and all other rights, easements or claims thereof."

And here is the map.

The Court: Don't they call it a private way?

Mr. English: "All that certain strip of land known as 'Saw Mill Lane,' formerly leading—" and then it gives the description. It mentions a private driveway as one of the boundaries, and then it is outlined in yellow.

Here is the elevation map, your Honor. It is a duplicate of the one in evidence that shows Saw Mill Lane starting down here where the Mayor indicated and running up to the railroad there, and the contract which is in evidence, the elevation contract, under the caption "Vacation of Streets," says, "The Town shall vacate Saw Mill Lane from its intersection with Morris Street to the northerly terminus, or so much thereof between said points as now exists as a public street or highway of said Town."

It has been signed by the railroad company.

The Court: Wasn't it vacated?

Mr. Stallman: Yes.

Mr. English: Vacated pursuant to this agreement, and the rest of it was kept open.

The Court: For the purpose set forth in the contract?

Mr. English: Yes, sir, exactly so. That is all we are talking about. What I am trying to show is what Saw Mill Lane is, how much traffic there is and anything else about it that may be material.

Mr. Stallman: There isn't any of it that is material.

Mr. English: I think it is highly material.

The Court: I didn't suppose there was any question in this case that the offending cab drivers were on their way to and from Saw Mill Lane.

Mr. English: I don't think there is, but there is the question—

The Court: The question here is the establishment in this particular place of a public hack stand. The Railroad Company's position is, "This is our land, never ceded, never granted, always held by us, over which the municipality had a limited right." Your position is, "We have a right to regulate the use of this land because it belongs to the public."

Mr. English: My position is we have a right to regulate it because it is property devoted to public use, and I tried to support it on that principle of law that private property devoted to public use is subject to public regulation, and it is agreed to in this contract, and that is why I am bringing in Saw Mill Lane, because there is traffic in and out of Saw Mill Lane over this very driveway which, as I read the contract, gives us a right of regulation. All I want the witness to do is to tell the Court where the drive way is, what it physically consists of and describe how much traffic there is over it.

The Court: He has told us what it consists of.

Mr. English: Yes.

The Court: He has told us who has places of business upon it.

Mr. English: Yes.

The Court: He has told us about the traffic from Saw Mill Lane into Morris Street.

Q. How much traffic is there, Mayor, as far as you know or have observed?

The Court: I am taking this, Mr. Stallman, subject to your motion to strike out my questions and I will grant you an exception for declining so to do.

Exception noted.

Q. The question is the extent of the traffic, if you know it, Mayor, out of Saw Mill Lane onto the driveway on the station property. A. Well, there is considerable traffic to the Erie depot. All of the traffic which goes to the Erie depot either goes in on this driveway that is a substitute for Mill Lane, or comes in through Lackawanna Place across this driveway.

An adjournment was thereupon taken until Thursday, December 18th, at 10.30 A. M.

Thursday, December 18th, 1924.

Case resumed pursuant to adjournment. Appearances as before.

CLYDE POTTS resumed the stand.

CONTINUATION OF DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mayor Potts, at the adjournment last night I was directing your attention to Saw Mill Lane. Please tell us what business establishments or houses or either, as the case may be, there are in Saw Mill Lane? A. You mean that would be approached by the passage—

The Court: That you didn't testify to.

Q. According to the map Saw Mill Lane runs out northeasterly from the Station Plaza, and the contract speaks of those having rights of ingress and egress in Saw Mill Lane. Who or what is there up there that would want rights of ingress or egress? A. The Morristown, Erie Depot is in there, and all the passengers to and from the Morristown and Erie Station go in and out.

Q. Yes. A. And the beef house is in there, I think it is Swift's Distributing House, and the meat men in town that buy their meat go in and out there to get it.

Q. Yes. A. There is the farmers' exchange in there, and then recently there has been a new establishment built there that uses those driveways as access to and from their place of business.

Q. In view of that fact what effect does that have on the traffic that goes along the driveway on the Station Plaza?

Mr. Stallman: I object to that question as being incompetent, immaterial and irrelevant. The maps in evidence show that Saw Mill Lane is directly connected with Lumber Street, a public highway, at its terminus, and there is no proof or presumption that the station driveways are used for the traffic to and from Saw Mill Lane. I make the objection particularly because if there is any such traffic it has no bearing upon the question of locating a hack stand next to the station, and whatever the question involves it certainly involves a conclusion, it does not call for any statement of fact.

The Court: It seems to me that the Mayor can testify, if he knows, as to the extent of traffic in and to and from Saw Mill Lane through the Station Plaza, in Morris Street. I think it is Morris Street, isn't it?

Mr. English: Morris Street is the other side of the track, yes.

The Court: If he knows.

Mr. Stallman: The point I was calling your attention to is Saw Mill Lane is the little way shown upon the corner of the map, and while the name is not on the map here is a street known as Lumber Street that goes right into Lackawanna Place, and as you come out of Saw Mill Lane direct into Morris Street you come beneath the railroad track and across the railroad company's driveway into Morris Street.

The Court: Yes.

Mr. Stallman: The issue in this case, as I understand it, is locating a taxicab stand here in this plaza.

The Court: Yes, I think that is true but I think he can testify, if he knows, what the traffic is across the station plaza to those having rights of ingress and egress from Saw Mill Lane into Morris Street. That is reserved in the contract. Whether or not it is relevant I don't know.

Mr. Stallman: Your Honor heard my objection.

The Court: I note your exception. I think your exception goes as much to my form of question as to Mr. English's.

Mr. Stallman: All right.

Exception noted.

Q. (Question read as follows: "In view of that fact what effect does that have on the traffic that goes along the driveway on the Station Plaza?")

The Court: I would limit it to the traffic from Saw Mill Lane into Morris Street.

Mr. Stallman: By the direct route.

The Court: By the direct route.

Mr. English: If your Honor please, on that, the contract does not limit any particular route. The contract provides a driveway along the easterly side of this elevation wall and says it must be forty-eight feet wide, and describes how it shall start down below Lackawanna Place and go up towards the north and curve around under the track.

Mr. Stallman: I am sure you don't want to mislead the Court.

Mr. English: I am not going to mislead anybody. I have the contract in front of me.

Mr. Stallman: I wish you would read it accurately.

Mr. English: "The driveway shall be forty-eight feet wide where it shall intersect the railroad, they shall construct a passageway underneath." It describes the height of the passageway. The railroad shall provide lands for the laying out of the necessary driveway, it shall be kept open at all times for passengers and those having rights of egress to Morris Street in Saw Mill Lane.

If you will look at the map you will see you can get to Morris Street in two ways, by going down straight out of Saw Mill Lane under the tracks, or you can come down past the tunnel, as they call it, to the station goin to Morris Street down at the southerly end, but most of them go down the easterly wall of the elevated track, and under the tracks down there, and they go on out and make a big curve and they get out on Morris Street.

The fact is, as we propose to show, the traffic from Saw Mill Lane goes both ways.

The Court: All I am concerned with is the extent of the traffic from Saw Mill Lane to Morris Street.

Mr. English: Yes, sir.

The Court: I will take evidence as to that over Mr. Stallman's objection. I don't think I will take evidence except as to traffic to and from Saw Mill Lane into Morris Street.

The Court: All I am concerned with is the

Mr. English: That is all right, sir. The only point your Honor and I differ on is whether you are going to limit the route to Morris

Street. I say the people have two routes to Morris Street. One under the tunnel by the freight house under the under crossing, the other down along the easterly wall, because you see Morris Street runs north and south, roughly, and you can approach it from one end or the other.

Mr. Stallman: That is not Morris Street, that is Lackawanna Place.

Mr. English: Morris Street goes up straight.

The Court: I should think it would be better to divide the testimony into the traffic into Morris Street by the direct route and through Saw Mill Lane into Morris Street at the point of intersection with Lackawanna Place.

Mr. English: All right. I have no objection to that. I will re-frame the question.

The Court: It looks from the map as if it is almost equidistant.

Q. Now, Mayor, I will ask a new question. In view of the fact there are in Saw Mill Lane beef houses, freight stations and other business establishments, tell us if you know from your observation how much traffic there is which goes out of Saw Mill Lane directly under the railroad by the freight station and out into Morris Street that way, whether it is a small or inconsiderable or a large volume of traffic? A. There is a great deal of traffic that goes in and out of there, both foot and vehicular. I have seldom been down there but what I have seen either pedestrians or vehicles going in and out to the Saw Mill Lane.

Q. Now, tell us if you know how much of that Saw Mill Lane traffic goes down along the easterly

wall of the Lackawanna tracks and strikes Morris Street down through Lackawanna Place? A. Some, but not as much as the other way.

Q. What about the traffic from the Morristown and Erie Station, that part of it which wants to go south on Morris Street, which way does that go, do you know? A. I have seen vehicles moving south on that driveway through Lackawanna Place onto Morris Street, and I have seen them moving north.

Q. It goes both ways? A. Yes, sir.

Q. There has been some reference to Lumber Street in connection with this situation. Do you know where Lumber Street is? A. I do, yes, sir.

Q. Where is it with respect to Saw Mill Lane? A. Lumber Street?

Q. It is mentioned on the map attached to the bill of complaint. Is there any tendency on the part of traffic out of Saw Mill Lane going through Lackawanna Place to go up around through Lumber Street as compared with going down through the driveway alongside of the elevation wall?

Mr. Stallman: I object to that as calling for a conclusion.

Mr. English: I can re-frame the question if that is your objection.

Q. What have you observed to be the use which the traffic makes from Saw Mill Lane going south through Lackawanna Place to Morris Street? Does it go up around Lumber Street or down along the side of the elevation wall? A. I don't know that I have ever seen any traffic going to the Erie depot through Lumber Street. Lumber Street is only a town street for part of the way, the rest of it is a private driveway.

Clyde Potts. Called by Defendants. Direct.

Q. Have you seen traffic going along the elevation wall a distance on Saw Mill Lane? A. I have, yes.

Q. Since the Court made its injunction in this case I think you said the cabmen park now on Lackawanna Place, the public cabmen? A. They do, yes.

Q. What about Mr. Welsh's cabs, where do they park? A. Mr. Welsh's cabs park on the cab stand that is in controversy in this case.

Q. What is the effect on the traffic conditions of the station of these two parking places there? A. There isn't any doubt—

Mr. Stallman: I think we are now getting into a situation subsequent to the granting of the injunction about which Mr. English so strenuously objected yesterday.

Mr. English: This is a different situation, your Honor. I was before the Court of Appeals seeking a stay from your Honor's temporary injunction.

The Court: Did they grant it?

Mr. English: No, sir, and one of the first questions they asked was what was the effect of the injunction on the traffic conditions. At that time I couldn't answer, so I said I didn't know. What they did was to deny my motion with leave to come in again if it appeared or I could demonsrate to the Court the fact that the preliminary injunction or the injunction was detrimental to the traveling public with respect to traffic conditions.

We are having a final hearing with respect to the settlement of a final decree, and it seems to me if I could demonstrate to your Honor the

preliminary injunction which you granted was a bad thing from the standpoint of the public it might move you to change your mind with respect to whether or not there should be an injunction.

The Court: I think that point would be well taken if as a result of the injunction an adequate service was not given to the traveling public. If the confusion to the traveling public results from an improper placing of a hack stand by the Town of Morristown so as to interfere with ingress and egress to the station of the Lackawanna Railroad, then it seems to me the Town of Morristown has acted improperly, and the result of the confusion is due to their act and not due to any act of the Lackawanna Railroad Company or this Court in aiding the Lackawanna Railroad to control its own railroad property.

Of course if this witness can show that the result of the injunction was imperfect service by the Lackawanna Railroad taxicab drivers, then I think that evidence ought to be admitted, because of course part of the basis for the interference is that the Lackawanna through its contract with the taxicab driver is able to give full and complete service to the traveling public, and I think possibly that line of distinction which was in the minds of the Circuit Court of Appeals—I assume it was a question addressed by the senior judge.

Mr. English: Judge Woolley, I think, asked me that question, either he or Judge Buffington.

Mr. Stallman: Your Honor, he asked whether there was a state of confusion and danger to

the people because of, as Mr. English put it to the Court, the absence of policemen there to protect the lives and limbs of the citizens.

Mr. English: He inquired generally into the traffic conditions and as I said I didn't know because I hadn't taken the precaution to consult our people in advance and hadn't any information one way or the other at the time, I couldn't answer their question, and they sent me home with leave to come again if I could demonstrate it.

Now, with that in mind I am addressing this question to the witness.

The Court: I think if the witness testifies as to troubles, if there be troubles, caused by the acts or the inactivity of the railroad company, we may listen to them. If coupled with his testimony is a confusion caused by the municipality in its efforts to evade the effect of the order of this Court it does not interest me very much.

Mr. English: I don't think the municipality is trying to evade anything Your Honor made this decree which the municipality is obeying. You said they can't park there and they don't.

The Court: If establishing a taxicab stand at a place where a taxicab stand ought not to be, and the result of that is confusion in the station grounds and the approaches to it the trouble is with the municipality and not the railroad.

Mr. English: That would be equivalent to saying there should not be any public taxicab stand there except for Mr. Welsh.

The Court: I don't know.

Mr. English: With your Honor's permission, I would like to ask the question and take your Honor's ruling on it.

The Court: Yes.

Q. Question read as follows: "What is the effect on the traffic conditions of the station of these two parking places there?"

The Court: I think I will allow that over Mr. Stallman's objection, but I would like the distinction to be clearly drawn as to the cause of confusion.

Mr. English: We will follow that up.

Q. What is your answer to that question, Mayor? A. Well, when the injunction was issued by this Court restraining the town from establishing a public hack stand on the driveway—

The Court: Wait a minute, Mayor. I think the question is what you have observed as to the actual working out of the two cab stands.

The Witness: Yes, sir, I was coming to that, your Honor.

Q. Come to it now. You commute twice a day? A. I was going to say then, we then moved the licensed cabmen of the town to a cab stand on Lackawanna Place which had been formerly designated as a public hack stand and which the men formerly occupied. That was at the place to the south of the shelter house, the cab stand in controversy being to the north. The effect of these two cab stands—

Mr. Stallman: Just for the Court's information is that the place —

The Witness: That is the place I described, yes, sir.

Q. Go ahead, Mr. Witness. A. We had already—

Q. You started to say the effect of the two cab stands, and then you were interrupted. A. Yes, the effect of these two cab stands is, of course, when passengers coming in on the trains want a cab, if they select one from the towns' cab stand that cab goes to the north and comes into the shelter house. If they select one of the three licensed cabmen that Welsh has they come in from the north and the result is they meet practically head on under this shelter house and there is resulting confusion from that. Also the traffic to and from the Saw Mill Lane comes in there to complete the traffic situation generally. Having these two cab stands there simply adds to the confusion on the driveway and on Lackawanna Place.

Q. How many licensed cabmen are there in the Town of Morristown? A. About forty-two.

Q. How many cabmen will the Town of Morristown support? A. I think forty-two is, I think probably forty-two is too many to do the business of the town and to render high class service. We feel there are too many cabmen there, there is not enough business to support them and the result is there will be a depreciation in service.

Q. What is the character of the service now? A. It is very good. The cabmen without exception have very good cars, the service is good.

Q. It appears already that Mr. Welsh has three licensed cabs. Is there any other cab driver of Morristown who has as many as three licenses? A. No, sir, he has more than anybody else, no other cabman has more than two licenses.

Q. Is Mr. Welsh with three licensed cabs able to take care of the traveling public at the Morristown station?

Mr. Stallman: I object to that as being incompetent and immaterial, and it calls for a conclusion on the part of this witness. He is not a taxicab operator or an expert in knowing what Mr. Welsh could do.

Mr. English: I thought I was carrying out your Honor's suggestion of a moment ago.

The Court: I think you have progressed rather far from that. I don't believe it is material on that question, because the difficulty with Mr. Welsh seems to be he can't get as many licenses as he has cabs and drivers. There seems to be a withholding of privilege from Mr. Welsh.

Mr. English: I don't want your Honor to pre-judge that because I am going to find out about that.

(Question read.)

The Court: I think unless you meet that assertion made by Mr. Welsh that he can't get his licenses it is irrelevant.

Mr. Stallman: I would like to call your Honor's attention to the fact that Mr. Welsh's activity is under a contract with the railroad company which requires him to the satisfaction of the railroad company to furnish sufficient equipment and drivers to handle all the traffic from that station, and I don't think it should be pre-judged by this witness or anybody that Mr. Welsh would not do as his contract requires, or that the railroad company would not do its full duty in that respect.

Mr. English: I don't know what the railroad company would do. I understand your Honor overrules the question?

The Court: I do for the present.

Mr. English: I pray an exception.

Exception noted.

Exception allowed.

Q. What is the policy of the Town of Morristown, of the authorities of the town, with respect to the licensing of additional cabs in the Town of Morristown for Mr. Welsh or anybody else?

Mr. Stallman: I don't think we ought to go into that. We are not dealing with theories in this case.

The Court: No, we are dealing with an actual situation.

Mr. Stallman: Yes.

The Court: Now I am going to ask a question, and of course the usual rule avails that both sides may have an exception to it.

BY THE COURT:

Q. Has Mr. Welsh applied for more than three licenses in the Town of Morristown for taxicab drivers? A. He has for cars, your Honor.

Q. For cars? A. Yes. We license both cars and drivers.

Q. Yes. For the eight or ten cars he has he has made application? A. He made application, I think, for seven additional cabs over what he had in 1923.

Q. Those licenses were not granted him, were they? A. No, sir.

Q. Action was withheld? A. Well, I don't know whether you would say action was withheld. They were not granted, your Honor, his check was simply returned to him.

Q. There has been more or less dispute about this matter, hasn't there? A. Not much about that, your Honor. He asked me personally, if he could have seven additional licenses, and I told him the policy of the Board was we would not grant any more because we felt there were then enough cabs in town to do our business, and that to grant him any additional licenses would mean we would have to revoke one of the others to give him that one.

Q. I am going to ask you a very frank question, Mayor. Isn't it a fact that at this station plaza having a taxicab starter is a great advantage to the traveling public? A. I agree with you entirely, your Honor. It was the purpose of the Board of Aldermen when this controversy was settled to appoint a police officer who would regulate traffic and start the cars out and see that all the ordinances of the town and the rules which the Board prescribed for the conduct of the cabmen at the station were carried out, and if this case is decided favorably to the Town of Morristown we propose to provide a public starter there who will have charge of the cabs at the station. I think it is the only way to handle cab service now at the depots.

Q. That is paying a starter out of public money when the cost of maintenance of the starter at the railroad station ought to be met out of the cost of maintaining the service? A. Well, it comes out of the public in the end, your Honor, regardless of who pays it, and we had in mind we would take the fees which we get from the cabmen to pay the salary of this starter. Under the present plan the railroad

company proposes to take ten percent. of these gross receipts, and I presume they had in mind they would use that for the provision of this starter. Under the plan we suggest we fiure the Town of Morristown can by the license fee provide enough to care for this. It is as wide as it is long, and in the end the public pays anyhow. In our situation the matter would be under the control of the governing board of the Town of Morristown. In the other case it would be under the control of the Lackawanna Railroad Company, and of course with their contract with Welsh all complaints from bad service or overcharging arising out of this service would have to be taken up with the Lackawanna Railroad Company in Hoboken, which we think would be a disadvantage.

The Court: I think you have answered my question. I think you have answered it very frankly and fully.

Mr. Stallman moves to strike out the question and answer and the motion is denied and exception allowed.

Exception noted.

Mr. English moves to strike out the question and answer. The motion is denied and an exception allowed.

Exception noted.

Mr. Stallman: I was thinking about the rule of admission of evidence under the limitations of the pleadings.

Mr. English: You have the benefit of your exception then. Shall I proceed sir?

The Court: Yes.

By Mr. English:

Q. I will come back to my original question. In view of the policy which you have stated of the Town of Morristown with respect to licensing additional cabs and the effect of that on existing cab licenses has Mr. Welsh with his three cabs sufficient equipment to take care of the traveling public at Morristown?

Mr. Stallman: I renew my objection, if the Court please.

The Court: I think I will sustain the objection.

Mr. English: Your Honor will allow me an exception?

The Court: Yes.

Exception noted.

Q. Now, Mayor, you have been there a great deal, you are a commuter and all that. Since the passing of the ordinance which is mentioned in the bill of complaint what have you observed with respect of the conduct of the cabmen as to where they stand when they solicit fares prior to the making of the Court's injunction. Did they go on the platform, the upper elevated platform, did they get in the lobby, as the witness called it, did they stand by the cabs or where did they stand?

Mr. Stallman: That is leading.

Mr. English: I don't think so. I understand the test of a leading question is to suggest an answer. That doesn't suggest any answer.

The Court: I will allow it.

Q. What do you say? A. Is that during the month—

Q. Since you passed this new ordinance and before the Court made this injunction which abolished the independent— A. I never saw the licensed cabmen on the platform of the Delaware, Lackawanna & Western Railroad Company. I never saw a licensed cabman in the shelter house when I was at the depot, which is at varying times of the day, I have never seen any of the cabmen during that interval, I never saw any of the cabmen except on the sidewalk near their cabs.

Q. You made it your business to investigate there? A. I made it my business to investigate, and coming in as a commuter I come in any time from the five o'clock in the evening up to until midnight. I have had an opportunity to observe them at all times of day and night.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Mr. Potts, you became Mayor of Morristown about two years ago? A. February 1st, 1923.

Q. That was just a few days after the railroad company made the contract with Welsh? A. I don't recall when the contract was made with Welsh.

Q. December 29, 1922. As soon as you became Mayor you learned of the fact that the railroad company had made this contract with Welsh? A. Yes, we were apprised of the contract with Welsh by the railroad company when Mr. Seager attended the meeting of the Board of Aldermen in January.

Q. Was that the first intimation you had of it? A. The first I had that a contract had been executed, yes, sir.

Q. That was not the first intimation you had that such a contract was in contemplation or that such a contract was about to be put into effect? A. No, sir.

Q. Your attention was called, was it not, to the notice which was given to the independent taxi operators and was posted at the station along the driveway, that is on or about January 10, 1923, notifying the taxicab men that a contract had been made with Welsh and that they were directed to cease the parking of cars on the railroad company's property and to cease soliciting patronage on the railroad company's ground? A. Not by the railroad company. Some of the taximen came to me and told me they had been ordered to get off of this plaza and asked me what they should do about it. I took the matter up with our attorney.

Q. Just a minute. I say your attention was directed to that fact, wasn't it? A. Not by the railroad company.

Q. Well, by somebody. A. Yes, the taximen told me they had had a notice. I never saw any other notices, I never saw the posted notice, but it is possible this thing the cabmen told me about was the same thing you refer to. I assume it was.

Q. You instructed and advised the cabmen not to pay attention to that notice, did you not? A. I did, on advice of the town attorney.

Q. That was followed by an injunction against the taximen in the Town of Morristown in the Court of Chancery? A. You refer to the injunction of Judge Foster?

Q. Yes. A. Yes.

Q. And upon that injunction being served the taxicab men did remove their cars from the railroad company's grounds, didn't they? A. So far

as I know they obeyed the injunction implicitly, yes, sir.

Q. And you thereupon as Mayor designated a cab stand just off the railroad company's property in Lackawanna Place? A. I did, with the advice of the police committee.

Q. Before you became Mayor did you pay any particular attention to the taxicab situation in the Morristown station? A. Why, I used them right along.

Q. That is not answering the question. A. I observed the taxicab situation as one of the users, probably daily user or frequent user of the service.

Q. You never gave it any special attention? A. No more than any other citizen would, no.

Q. You never counted up the number of taxicabs that tried to get into the railroad company's property, did you?

Mr. English: When, before he was Mayor?

Q. Before you became Mayor? A. The number that tried to get in?

Q. Yes, in the evening? A. I never counted them, no. I observed the conditions that existed there.

Q. You did observe, however, as a commuter there were about twenty-five or thirty-taxicabs trying to congregate around the station in the evening? A. I can't say that I ever noticed any difference there, Mr. Stallman, then, no marked difference then over what it was at any time since then, either during the injunctions or without the injunctions.

Q. So your answer is you made no such observation? A. No, I say the result of my observation was I noticed no marked difference.

Q. You can't answer my question directly, then, as to whether you observed just prior to January 1, 1923, that in the evening between five and half-past six between twenty-five and thirty separate taxicabs endeavored to get into the plaza of the Lackawanna Railroad Company at Morristown and that their drivers then went on to the station platform and around the door and solicited traffic?

Mr. English: If your Honor please, this brings up the same question we had yesterday. I don't know how your Honor will rule, but he is going way back not only prior to the contract but even prior to the time Mr. Potts was Mayor. It has been my thought all along that the case started as of the time laid in the bill, with an accomplished fact of the contract between Welsh and the Railroad, and everything that had gone before was past history and we began with the time when the town enacted the ordinance which moved the railroad company to file this bill.

The Court: No, I think we are concerned with the act of the railroad company in making the contract with Welsh. In other words, you have a situation at a railroad station that has to be met in some way. If you don't meet it you are going to have just what they had in Venice. If you have ever been in the station at Venice where you are met by a lot of howling, crying gondoliers you are rather glad to get peacefully off the train at the New York station and be met by a starter and put in your cab. Human nature is the same on both sides of the water, and I assume there may have been some reasons which would actuate a

reasonable person at Venice in changing the conditions and in the minds of the Lackawanna Railroad people at Morristown. I think it is proper for me to hear what that situation was leading up to that contract.

Mr. Stallman: It is cross examination.

The Court: I am going to allow it and allow an exception. If Mr. Stallman would rather have it as cross examination I see no reason why he should not be given a certain latitude.

Mr. English: I was not objecting on the ground it was not cross examination. My thought is if we have filed a cross bill attacking that contract between Welsh and the railroad as a thing they had no right to make, then I think the issue of the contract would be before the Court. But we have always conceded as a matter of law the railroad had a right to make a contract with its favorite cabman, and I still concede it, under the Donovan case in the Supreme Court of the United States and the Thompson case in the Court of Appeals of New Jersey. We have started, in our attitude on this case, with the accomplished fact of the agreement. That being so I have not yet been able to bring my mind to see any relevancy in what took place prior to the making of the contract.

That being the accomplished fact, what now is the situation? The bill of complaint says nothing about the contract other than as individuals and makes its whole charge against an ordinance passed last October. That is the ground of my objection, which I think is a fundamental objection to the whole line of testimony.

The Court: I am afraid I don't agree with you. I will allow the question and allow an exception.

Exception noted.

Q. Question read as follows; "You can't answer my question, then, as to whether you observed just prior to January 1, 1923, that in the evening between five and half-past six between twenty-five and thirty separate taxicabs endeavored to get into the plaza of the Lackawanna Railroad Company at Morristown and that their drivers then went on to the station platform and around the door and solicited traffic?" A. Didn't I answer that?

Q. Did you or did you not observe that condition? A. No, I didn't observe any such condition. I usually leave the train and walk—

Q. That is enough, I don't want a speech.

Mr. English: I object to that.

Mr. Stallman: I have a right to cross examine to know if he observed it. He could say yes or no.

Mr. English: He is entitled to answer the question.

Q. Then, Mayor, after you became Mayor on January 1, 1923, did you then take or make occasion to look into the situation to see whether there was any congestion or confusion with reference to the taxicabs coming into the station grounds in the evening? A. I did, after this matter was brought to my attention, some time in January.

Q. All right. Then did you count the number of taxicabs that endeavored to get into the plaza in the evening? A. They were already in the plaza.

Q. Did you count them? A. I didn't count them, no. There was a row of cabs along the parking space there. I didn't count them.

Q. Did you then observe there was in fact considerable confusion, wasn't there? A. Why, I think no more than would be attendant upon the incoming of a train with the discharge of the passengers and the people seeking their conveyances to take them home, I think nothing unusual, I never saw anything unusual. Once in a while the Mendham bus would park in there under the shelter house and upset traffic for a short time until it was removed.

Q. Do you remember a meeting of the Board of Aldermen on January 15, 1923, at which the Board received a communication from Mr. Seager, and at which Alderman Coggeshall made a motion it be the sense of the meeting, and to be so expressed in the Press that the town will go just as far as possible to prevent the Railroad Company from telling the town how to run its own taxicab service? A. Was that the meeting Mr. Seager attended in person?

Q. I think it was. A. I remember Mr. Seager's coming before the Board. I don't remember any remark such as you attribute to Mr. Coggeshall.

Q. Did you at that meeting or at some meeting in January make this statement, "We will go the limit, so far as they want to go, and when we go that far we will give them another ride." A. Are you reading from a newspaper now?

Q. Yes. A. I don't know, I really think you ought to get that reporter that wrote that.

Q. Did you make that statement? A. I don't recall any such statement as that. I do know—

Q. All right, I asked you whether you made that statement and you said no. A. You are reading language from a newspaper which I don't wish to assume the authorship of. I can tell you what I said at the meeting if you want to know.

Q. I asked you if you made that statement and you said no. You of course remember the ordinance, do you not, Mayor, that was introduced on January 19, 1923, and passed on February 7 of that year? A. What was the title of the ordinance?

Q. "An ordinance to regulate traffic on the driveway lying on the east side of the shelter house of the Delaware, Lackawanna & Western Railroad Company in Morristown extending from the American Railway Express office to Lackawanna Place." A. Was that the ordinance that prohibited the standing of cars on that place?

Q. Yes. A. Yes, sir, I remember that ordinance.

Q. Yes. A. Yes, sir, I remember that ordinance.

Q. At the time that ordinance was introduced the taxicab men had been excluded from that property by an order of the Court of Chancery, had they not? A. They had, yes, sir, why—

Q. And no taxicabs were then using the plaza except the cabs of Mr. Welsh? A. Mr. Welsh had three cabs there, I think there was one other, I am not sure, but I am under the impression there was one other cabman licensed by the town who was standing there.

Q. He didn't obey the injunction? A. Yes, sir.

Q. That resulted in having a fewer taxicabs in the station plaza than before, did it not? A. No, sir.

Q. Before this injunction was granted all the independent taxicab men came and parked their cars between the under crossing and practically

down to Lackawanna Place, did they not? A. They parked there.

Q. Suppose you answer me yes or no? A. I don't understand the limits of the place they parked by your question. I could tell you where they parked in my own words.

Q. Prior to the granting of the injunction the taxicab men, particularly in the evening, came upon the railroad company's property and parked their cars on the shelter house side all along there between the under crossing at the far end of the plaza down to the shelter house, and even below the shelter house in the direction of Lackawanna Place, is that not so? A. No, sir.

Q. What part of it is wrong? A. I never saw them parked beyond the shelter house. They parked from the shelter house northerly to the under crossing at the American Express building.

Q. They did not so park after the injunction was issued? A. No, sir.

Q. The only cars that did park there then were the cars of Mr. Welsh and possibly one extra car that belonged to somebody else? A. Yes, sir.

Q. Was that other man a licensed taxicab driver? A. I think he was licensed by the town. Yes, there was one licensed by the town belonging to Mr. Hough, I believe.

Q. So in that situation with only Mr. Welsh's cars standing there and possibly one other, the Town of Morristown by action of yourself individually adopted an ordinance in which in the first section it provided that no automobile or other vehicle engaged or that which may be engaged in the transportation of passengers for hire shall be parked or shall be allowed to stand for a longer time than is necessary to take on or let off pas-

sengers, expressage or baggage, and in no place longer than two minutes along the curb on the westerly side of the driveway mentioned in the title of this ordinance, from the southerly side of the entrance way to the shelter house or tunnel leading under the depot northerly to the turn of said driveway under the railroad. That was the ordinance that you passed on final passage on February 7th, was it not? A. It was passed by the Mayor and Board of Aldermen.

Q. You were the Mayor? A. Yes, sir.

Q. You voted for it? A. Yes, sir. If I didn't it was an oversight.

Q. And the effect of that ordinance in its designation of taxicab men or taxis parking on the railroad property affected only La Clare L. Welsh, did it not? A. It may have had that effect, he and Mr. Hough.

Q. Why do you say may, didn't it have that effect? A. It excluded him from parking in that place, yes, he and Mr. Hough and any other that were parking there, any private hacks that were parking there.

Q. Do you recall another ordinance entitled, "An ordinance to license and regulate hacks, cabs, cars, omnibuses, stages and other vehicles other than auto buses, commonly called jitneys, used for the transportation of passengers in the Town of Morristown, and the owners and drivers of such vehicles," introduced March 21, 1923, and passed at the meeting of April 6th, 1923? A. I don't remember it by the title unless I knew the purpose of it, Mr. Stallman. There were several ordinances before the Board relating to—

Mr. Toms: That ordinance was not passed Mr. Stallman. I object to that on the assumption it was passed.

Q. Now, Mayor, do you remember testifying in the certiorari case that the reason that you instructed the taxicab men not to obey the regulation of the railroad company to stay off this property was because you took the position that the railroad company didn't own the station grounds? A. No, sir, I didn't testify that the Railroad company didn't own the grounds. I testified that the railroad had executed a contract with the town of Morristown, wherein they specifically gave the town the right to regulate foot and vehicular traffic on the plaza, and under the instructions of the attorney to that effect I notified the hackmen not to move until they were ordered to do so by the town.

Q. Do you remember this question, do you remember I asked you whether you instructed the taxicab men to disobey the orders of the railroad company?

Mr. English: Read the question Mr. Stallman.

Mr. Stallman: I don't want to put too much on the record.

Mr. English: I want you to put it on right, whatever you do put on. I have the same book right in front of me.

Q. And you replied, "After I read the contract between the town and the railroad company then I notified the hackmen that they were to remain on that public hack stand." Do you remember that?

Mr. English: I object to the form of that question. I think if a witness is to be interrogated about a statement he made he is entitled to have the question he is alleged to have answered and not an abstract of it that counsel makes put to him. The book is here and counsel can read it. I am not objecting to his reading it if he reads it accurately. I object to his paraphrasing it. It is not fair to the witness.

Mr. Stallman: All right.

Q. Do you remember this question, "And you don't know, do you, any dedication by the railroad company of this property to the Town of Morristown, a dedication by the railroad company to the Town of Morristown of this so-called plaza property," and you answered, "As I remember, I assumed it was dedicated to the public by usage, and I assumed that that was dedication of it." A. I remember the conversation we had during that hearing, and it was similar to the lines you mentioned there.

Q. You so testified, didn't you? A. Yes, that was part of it.

Q. Now, you have mentioned, Mr. Potts, the traffic in Saw Mill Lane, and that on Saw Mill Lane there is a beef house and a station of the Morristown and Erie Railroad. That is a little railroad that runs from Morristown over to Caldwell? A. Connects with the Erie at Caldwell and goes on to Jersey City.

Q. Can't you answer my questions? It runs over to Caldwell, doesn't it? A. The Morristown and Erie?

Q. Yes. A. It runs farther than that. I have taken the Morristown and Erie from Morristown to Jersey City.

Q. At Caldwell you took an Erie Railroad train, didn't you? A. I might have changed cars there. I don't remember whether or not I did.

Q. The Morristown and Erie Railroad is McEwen's Railroad that runs from Morristown to Caldwell, isn't it? A. The Morristown and Erie probably is, I don't know.

Q. That is what I asked you. A. I don't know what the corporate limits of the Morristown & Erie Railroad are.

Q. Why do you say it goes to Jersey City if you don't know? A. Because I know you can go to Jersey City over there because I have gone there. How much nearer you can go depends upon the option of the passenger.

Q. The fact you can go to Jacksonville by way of Albany does not mean that the New York Central runs to Jacksonville. A. I think that is only a quibbling over the situation.

Q. The Morristown and Erie Railroad runs two trains a day. A. I couldn't tell you how many trains a day they run. They probably run—

Q. All right, if you don't know, I am asking you to guess. Their passenger trains are not operated by locomotives, are they?

Mr. English: What difference does that make?

Mr. Stallman: It makes this difference, if the Court please.

The Court: I am allowing the question. There is not even an objection.

Q. Do you know how the Morristown and Erie Railroad is operated? A. It is operated by locomotives because we have repeated complaints by people in that neighborhood of smoke nuisances arising from the locomotives.

Q. That is the source of your information? A. Yes, and I have ridden on the railroad and been conveyed both ways by gasoline cars, I believe, and by steam cars both. I don't use the Morristown and Erie much. I prefer the Lackawanna.

Q. How many freight cars are operated on the Morristown and Erie Railroad in a week or day? A. I have no knowledge of that Mr. Stallman.

Q. Did you ever make a census of the traffic that goes up Saw Mill Lane? A. An actual count of the traffic in and out.

Q. Yes. A. No, just my observation.

Q. And you are in business in New York, aren't you? A. Yes, that is my headquarters.

Q. And you go to New York pretty nearly every day, is that what you testified? A. Yes, about every day.

Q. Of course you don't stay in Morristown on business days between eight o'clock in the morning and six o'clock at night, do you? A. Well, I am there probably two days a week.

Q. You are not down Saw Mill Line? A. I am down there quite a good deal, particularly since this difficulty arose, I have been down there observing traffic, seeking to solve this problem if I could.

Q. What you have observed is that the traffic going through Saw Mill Lane, such as it is, most of it comes down and crosses under the railroad at the north end of the station and goes out to Morris Street? A. The bulk of it goes that way, yes, sir.

Clyde Potts. Called by Defendants. Cross.

Q. When was it that Mr. Welsh made application for the licenses for seven additional cabs? A. The first it came to my knowledge was early in 1923.

Q. That is shortly after this controversy arose? A. I don't know whether they had been before the prior Board or whether it came to me new, I couldn't tell you that.

Q. Are you the official who issues the licenses? A. I am, yes, sir.

Q. So all application must come to you? A. They go to the clerk under a new rule of the Board.

Q. Well, at that time the application had to go to you, is that right? A. No, sir, they went to the clerk.

Q. And they never came to your attention? A. Only when the clerk brought them to my attention.

Q. So they did come to you? A. Yes, the clerk referred them to me.

Q. Now, you say that your observation of the taxi conditions down in Morristown are the same as at other places. Have you made any observation of taxicab service at other places? A. At other stations?

Q. Yes. A. I have made the general observations a person does who gets off a train and uses a cab at other places.

Q. When you told the Court that the conditions in Morristown were the same as at other places did you mean similar conditions according to a casual observation? A. I mean that I noticed no essential difference in operation of our cabs in Morristown and other places.

Q. Did you ever make any observation — A. Except—

Q. —of the operation of the cab service at the Lackawanna station in Newark? A. I have used the cabs in Newark.

Q. Did you ever make any observation of the operation of the cab service there? A. I have made the usual observations there, yes.

Q. You know that at that place the cab service is handled by the Yellow Taxi Company? A. I don't know that it is.

Q. That was not included in your observation? A. Well, when you say the Yellow Taxicab Company, I don't know, you see so many yellow cabs running around everywhere you don't know which ones belong to the Yellow Cab Company and which ones don't.

Q. Did you observe that no taxicabs came up to the platforms at the Newark station of the Lackawanna until they were brought there by a starter? A. No, I don't think I noticed that. I think I stepped out of the depot, got in a cab and was driven away.

Q. Did you ever observe the operation of the taxi cab service at the Pennsylvania Railroad Station in Trenton? A. Yes, I frequently use the cab service in Trenton.

Q. You know taxicabs do not come up to the station platform until they are brought there by a starter? A. Yes, sir, I know that.

Q. Don't you consider that the best arrangement? A. I have said, I think, operation of the cab service by a starter is better and that we propose to do it in Morristown eventually.

Q. Do you recall the letter which you wrote to Mr. Seager under date of January 14th or 15th, 1923, in reply to his letter to you of January 13th? A. I don't recall it by date. There was some correspondence passed between us. If I could see the letter I could tell whether or not I recall it.

Clyde Potts. Called by Defendants. Cross.

Q. Do you remember writing to Mr. Seager this: "Every canvass of the Board of Aldermen shows—"

Mr. English: I don't think it is quite fair to read into the record a letter that has not been identified by the witness. If he showed him the letter and asked him—

Mr. Bolitho: He is reading from a newspaper article also.

Mr. Stallman: It was always my contention if you asked a witness if he said he wrote a thing or denied a thing that is all there was to it.

The Court: I think so.

Q. "—that it is for the independent drivers and opposed to the conferring upon one man or one company the monopoly of a taxicab business in Morristown with all of the attendant evils which follow monopolistic control." Do you remember writing that? A. If I could see the letter I might answer it, Mr. Stillman. It is difficult for me to say what passed between—

(Paper handed to witness.

I don't know, I might have, that might be a copy of the letter, I don't know. I know we had some conversations and some passages regarding the situation.

Q. I didn't ask you anything else but whether or not you wrote what I read in a letter to Mr. Seager. A. If you show me the letter I might possibly identify it. I can't identify a newspaper clipping.

Q. I show you, Mr. Potts, a copy of a letter, being a copy of the same letter I showed Mr. Coggeshall yesterday, addressed to the Mayor and Board of Aldermen of the Town of Morristown, January 12, 1923, signed by Mr. Seager, and ask you whether or not that letter was received by the Mayor and Board of Aldermen? (Indicating). This is the one marked for identification, C-21. A. Yes, sir, this letter was received by the Town of Morristown. I remember it.

Mr. Stallman: Now I will ask to have it marked.

Mr. English: I object to this. The letter is dated January 12, 1923. In my view of the case it is immaterial to the present issue. It is framed in the bill and answers. It harks back to the time they were discussing the effect of the contract between Welsh and the railroad company, which as far as this case is concerned I think is not in issue.

The Court: I will allow it.

Mr. English: Will your Honor allow me an exception?

Exception noted.

Exception allowed.

C-21 for identification received in evidence and marked Exhibit C-21.

Q. Well, then, you are of the opinion, are you not Mayor, that the location shown on the map marked "Cab Stand" or "Welsh Cab Stand" is the proper place for a cab stand in that station? A. If there is only one cab stand at the station, yes, if there is two cab stands there, no.

Q. You know that Welsh has got a man operating a cab in Welsh's service by the name of Hough? A. I am so informed.

Q. Did you within the last month or so after you found out that Hough was working for Welsh, did you make the statement you would like to revoke his license?

Mr. English: I object to that as immaterial. I don't think it makes any difference whether or not he did. I don't know what the fact is but I don't think that it has any bearing on this case.

The Court: I will allow it.

Mr. English: Exception.

Exception allowed.

A. I thought then and think now Mr. Hough is violating the injunction imposed by this Court.

The Court: I don't think that is responsive.

A. I think his license should be revoked, yes, sir.

Q. And you made that statement? A. Yes, sir.

Q. It is true, is it not, Mayor, that a large proportion of the commuters of Morristown own their own automobiles and use their own automobiles to come to and depart from the station grounds? A. A very great many own their own cars, Mr. Stallman, of the commuters, and their families, their wives or their chauffeurs meet them at the depot in the evening and bring them down in the morning. A great many use the cabs.

Q. There are more private cars used there than taxicabs, is it not so? A. No, I wouldn't say that. I would say it was a pretty even thing. I would

say it was about even. It depends on what trains you mention, there are certain trains, the late trains, people coming in, class of people who don't have cars, they walk or use the taxis in wet weather. The earlier trains that we call—

Q. I didn't ask you for all this. A. I am trying to explain.

Q. Can't you answer my question and then be perfectly satisfied? A. Well—

Q. You were in court yesterday, were you not? A. Yes, sir.

Q. Did you hear Mr. Coggeshall testify that the Board of Aldermen objected to the Lackawanna Railroad Company making arrangements for taxicab service that would probably interfere with business of the independent taxicab men, and that was one of the reasons the Board of Aldermen was opposed to this arrangement? A. I heard his testimony. I think he was speaking for himself, not for the Board of Aldermen.

REDIRECT EXAMINATION BY MR. ENGLISH:

Q. Mayor, you were asked on cross examination to state your observations at the station prior to January of 1923 with respect to the congestion or crowding of the hackmen and you were interrupted. What was your observation on that? A. My observation was that when I alighted from a train I walked down the steps from the platform to the sidewalk adjoining the driveway and walked along until I found a taxi man I was used to driving home with, and he drove me home. So far as I can recall, he was always in or near his car, and I observed that other passengers seeking taxicabs did the same thing. Our people in Morristown have

their own cabmen that take them home. It is a habit with them. The same cabmen have been taking our people home for years, and at night when they come down from the trains they select a cabman they are used to having taken them home. I did the same thing. My observation was that that was the situation.

The Court: May I ask what the situation was with respect to strangers alighting from the trains; did you observe what, if anything, occurred with respect to their finding taxicabs?

The Witness: They would be accosted by the cabmen, different cabmen who hadn't a regular passenger of his own would accost the seeming stranger and offer to take them to their destination, just as they do at almost any station in the country.

The Court: So that a stranger alighting at Morristown will be surrounded by all those cabmen who are not otherwise employed at the time of his arrival?

The Witness: I wouldn't say surrounded. I never saw a situation like that. The men stood by their cars and would call out "taxicab" or "hack", and so forth, and the stranger would get in either the first one or the one that look desirable to him. I never saw a situation where the cabmen crowded up on the station and surrounded the passenger.

Q. Where did the hackmen stand when they accosted the stranger? A. Well, they sometimes would crowd in crowds of two or three. That I think is as much as I can ever remember, but since

the Board passed the new ordinance they stand by their own cab. They did stand by their own cab.

Q. Prior to the injunction in this case? A. Prior to the last injunction, yes.

Q. I observe this ordinance which is mentioned and set up in the bill of complaint provides by its terms the cabmen shall stand by their cabs; until the injunction was made in this suit was that observed? A. It was; yes, sir.

Q. And enforced by the town? A. Yes, sir.

Q. On orders by you as Mayor? A. Yes, sir.

Q. The ordinance also provides that they must not leave their cabs until summoned either by a passenger or by an officer of the town charged with that duty. What was the idea embodied in the language "officer of the town charged with the duty"?

Mr. Stallman: I think the contract will speak for itself.

Mr. English: It is an ordinance.

The Court: The ordinance speaks for itself. You might ask him if an officer of the town was designated to act in pursuance of the terms of the ordinance.

Q. I will make the Judge's question my own. A. The officer of the town mentioned therein contemplated the employment of a starter.

Mr. Stallman: I don't think we ought to go into what was contemplated. The question was done then, not what they contemplated doing in the future.

The Court: I think that is true.

Mr. English: That is true, in answer to your Honor's question. Permit me to ask a question.

The Court: The question, Mr. English, is this, what was the officer designated by "a starter" in the ordinance; had you employed a starter? The answer was "not as yet."

Q. Is that right? A. That is right, with this explanation. We have been in and out of court so much on this thing we don't know where we are at; we haven't felt warranted to employ an officer yet.

Q. Your attention was directed by Mr. Stallman to a meeting of the Board of Aldermen January 15, 1923, and you were asked whether you had made certain remarks, something to the effect that you would give them a ride as far as you could, and then you were interrupted; what was the balance of that statement or conversation? A. The tenor of my remarks that evening was we had a written contract with the Delaware, Lackawanna & Western Railroad Company under which we had certain powers to regulate foot and vehicular traffic, and we proposed to go through all the courts in the land, if necessary, to establish the rights under that contract.

Q. What contract did you refer to? A. I referred to the so-called elevation contract.

Q. Your attention was directed to some of the testimony you gave in the so-called certiorari suit. Mr. Stallman read you this question and answer: "The dedication by the Railroad Company to the Town of Morristown of the so-called plaza property." You answered, as I remember, "I assumed it was dedicated to the public by usage, and I assume that was the dedication of it." Do you re-

member you were asked and answered as follows: "Did you know of any instrument dedicating it? A. No, only the contract between the town and the Company." Do you remember answering that way? A. Yes, sir.

Q. "Do you mean the elevation contract of 1912? A. Yes, sir." Is that true? A. That is true.

Q. Now, I want to direct your attention to some testimony which Mr. Welsh gave yesterday to the effect that you said at a meeting of the Board, I think the same meeting of January 15th, that Mr. Welsh could be left up in the air where the railroad had found him, or words to that effect. What was that conversation? A. The conversation was I attempted to bring peace about in this situation, and I suggested to Mr. Seager if the Railroad Company was dissatisfied with the taxicab service in Morristown the Mayor and Board of Aldermen would be glad to sit down with him and draft up a new ordinance regulating traffic at the plaza, and on the station and station grounds, and that we would be glad to cooperate in the passage of an ordinance, and we would pass it and see it was executed. Mr. Seager said, "How will that leave us with Welsh, with whom we have a contract?" I said to Mr. Seager, "That will leave Welsh just where you found him, I think, up in the air."

Q. Mr. Seager is the attorney of the Railroad Company? A. Yes, sir.

Mr. English: That is all.

Mr. Stallman: Just one other question I overlooked.

RECROSS EXAMINATION BY MR. STALLMAN:

Q. You said if you had two taxicab stands at the station there would be considerable confusion. Did you ever attempt to enforce a regulation that taxicabs coming out of Lackawanna Place should go around the flower bed and in front of the shelter house?

Mr. English: Before we get that answer. What regulation are you referring to, and when was it made with respect to the filing of this bill.

Q. Did you hear my question?

The Court: Let us not call it a regulation. Did you ever attempt to have the taxicab drivers entering Lackawanna Place drive around to the north on the east side of the flower bed, and then around to the south and in front of the station shed?

Mr. English: That is at any time?

The Court: I suppose while he was Mayor or whether he observed the city regulating it that way prior to the time he was Mayor.

The Witness: Is it all right to answer the question?

The Court: Yes, sir.

The Witness: Why—

Q. Can't you say yes or no?

Mr. English: I object to the witness being interrupted when he is asked a long question.

The Court: It is a very simple question as it is shown on the map.

Mr. English: And he is entitled to have an opportunity to answer it.

The Court: I think counsel is entitled to a yes or no answer.

Q. Can you answer that yes or no? A. Yes, we attempted that. That was the purpose of the ordinance we passed.

Q. You said a while ago that you conceived you had certain rights under the contract, the elevation contract, and you were going to enforce them if necessary in every court of the land. Did you intend by that to enforce in the courts that part of this contract which calls for the exercise of the police powers of the Town of Morristown for the enforcement of the rules and regulations of the Railroad Company, in respect to foot and vehicular traffic? A. I did not because I don't read that contract that way; I don't think the Town of Morristown is bound to enforce foot and vehicular traffic in accordance with any rules of the Railroad Company; I don't think that means that; it doesn't the way I read it.

Mr. Stallman: That is all.

REDIRECT EXAMINATION BY MR. ENGLISH:

Q. What did you have in mind in saying you proposed to see the contract was enforced or observed?

Mr. Stallman: I think that is not redirect; he stated what he had in mind. I don't think we ought to go into it.

The Court: I will let him say.

A. I think that the town has the right under that contract to regulate foot and vehicular traffic on the driveways leading around the railroad depot. I think the abandonment of Saw Mill Lane—

The Court: Wait a minute. What you really had in mind was this, in view of your construction of the contract you would attempt to have that so construed in every court of the United States?

The Witness: Yes, sir, I meant that was the way I construed the contract and as long as I was Mayor I was going to do that until some court told me different.

Q. Was there any element of public policy involving public welfare involved in that to your mind?

Mr. Stallman: There is nothing under the—

The Court: There is nothing that prevents a man charged with public duty from pursuing his legal remedy to the utmost, and it is rather his duty to do it, and I assume this gentleman as the Mayor of Morristown had that in mind.

I think we are pursuing a rather fruitless endeavor.

Mr. English: To do what?

The Court: To probe into this gentleman's motive, which I assume is good.

Mr. English: All right; we will let it go at that, sir.

I offer in evidence, if your Honor please, from the records of the Town, I presume there will be no objection to the formal proof, the

ordinance which was passed, approved and signed February 7, 1923. Mr. Stallman has already put in a copy of it. I offer the completed copy to which is attached the approval of the Commissioner of Motor Vehicles pursuant to the statute.

Mr. Stallman: We don't object.

Paper above referred to received in evidence and marked Exhibit D-4.

Mr. English: I also offer in evidence from the records of the Town ordinance passed, approved and signed September 18, 1923, to which is attached the approval of the Commissioner of Motor Vehicles of New Jersey.

Mr. Stallman: All right.

Paper above referred to received in evidence and marked Exhibit D-5.

Mr. English: I call attention on the record to the fact that this last ordinance offered in evidence came before the Supreme Court of New Jersey and is reported as Welsh and Delaware, Lackawanna & Western Railroad Company against Morristown, 1 N. J. Miscellaneous Reports, 468.

The Court: Isn't it reported in the official reporter?

Mr. English: No sir, it is in the miscellaneous reports.

I offer in evidence from the records of the Town the ordinance which is referred to in the bill of complaint, passed on October 22, 1924.

Paper above referred to received in evidence and marked Exhibit D-6.

W. Parsons Todd. Called by Defendants. Direct.

W. Parsons Todd, sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. English:

Q. Mr. Todd, are you a citizen of Morristown? A. I am.

Q. Have been how long? A. Forty years.

Q. I beg your pardon? A. Forty years.

Q. There has been an ex-Mayor Todd mentioned; are you he or are you a relative of his? A. Brother.

Q. Have you any official connection with the Town government at the present time? A. I am an alderman.

Q. For how long? A. Been alderman five years.

Q. You are an alderman now? A. Alderman now.

Q. Are you a commuter on the Lackawanna Railroad? A. I am.

Q. Have been how long? A. Twenty-five years.

Q. Have you had opportunity to observe the traffic conditions with respect to cab service and what not at the station? A. I have very carefully.

Q. You know of the passing of the ordinance which is referred to in the bill of complaint, which was passed in October of this year? A. I do.

Q. Following the passing of that ordinance where did the cabmen park their cabs and where did they stand when they solicited traffic? A. In the old, previous cabstand to the west of the shelter house, I guess you call it shelter house.

Q. Along the easterly wall of the elevation? A. Yes.

Q. Do you remember the place where your brother as Mayor designated a cab stand? A. I do.

Q. Is that the same place you are speaking of? A. Same place.

Q. Prior to the time when the contract with Welsh was made, which was the latter part of the year 1922, do you know where the cabmen parked their cabs? A. In the same place.

Q. Do you know whether the Town of Morristown through its police department exercised any authority or jurisdiction on the station plaza? A. Yes; I have seen policemen there many times.

Q. Do you know whether they exercised any jurisdiction over the traffic? A. Yes, they did.

Q. You are aware, I suppose, of the fact the Court of Chancery of New Jersey issued an injunction in January, 1923? A. Yes.

Q. And following that what, if anything, did the Town do with respect to the location of a cab stand in the vicinity of the station? A. We located our cabstand on the Lackawanna Place.

Q. That is by ordinance— A. That was a close to the—

Q. —ordinance which is now in evidence as exhibit D-5, which was passed on September 18, 1923? A. Yes.

Q. Since the court has made this injunction in this case where have the cabmen other than Welsh parked their cabs? A. They have returned to the cabstand, the previous cabstand on Lackawanna Place.

Q. The one that is mentioned in this Exhibit D-5? A. Yes.

Q. Have you had any opportunity to observe the result of that on traffic conditions in the driveway along the easterly wall of the station? A. I believe it makes more congestion in front of the station.

Q. Where does Welsh park his cabs now? A. He parks in the old cab stand.

Q. Do you know Saw Mill Lane that runs into the—? A. I do, very well.

Q. Do you know what business houses there are up there? A. I know there are several.

Q. Can you name what character they are? A. The packers, meat houses up there, and the Erie, the railroad station, I have forgotten the exact title.

Q. Morristown and Erie? A. Morristown and Erie station, and there is also a lumber yard up there.

Q. Do you know whether there is any traffic in and out of Saw Mill Lane? A. A great deal of traffic.

Q. Does that traffic go over the driveway on the station plaza? A. Very often.

Q. It appears from the map there are two entrances, or two exists from Saw Mill Lane to Morris Street, one under the railroad tracks up by the freight house and one down through Lackawanna Place. A. Yes.

Q. Do you know whether the traffic goes both ways from Saw Mill Lane? A. Both ways.

Q. Do you know Lumber Street? A. Yes, I know Lumber Street.

Q. Does traffic from Saw Mill Lane seeking Morris Street through Lackawanna Place go by way of Lumber Street or how does it go? A. It goes through Lackawanna Place in through Lumber Street.

Q. To get from Lackawanna Place to Saw Mill Lane how do you go? A. Have to go through the station plaza.

Q. Through the driveway? A. Yes.

Q. Is that the driveway mentioned in the contract, 48 feet wide? A. Yes.

Q. And the same driveway in which these cabstands are located? A. Yes.

Q. Now, it appears from the testimony of Mr. Potts, who preceded you on the stand, the Board of Aldermen now has a rule to the effect that cab licenses are issued by the Board. A. Yes.

Q. That is true, is it? A. Yes.

Q. Do you know how many licensed cabs there are in Morristown? A. Approximately forty.

Q. Do you know how that number compares with the amount of business there is to be taken care of by licensed cabs?

Mr. Stallman: It seems to me this is immaterial, if your Honor please.

The Court: I think it is repetition.

Mr. English: Yes, I think it is repetition but in view of the turn the case has taken I think it is material evidence, and I would like to have the benefit of it if I may.

(Question read.)

A. I believe it is too many, if anything.

Q. It appears Mr. Welsh has three licenses; do you know anybody else who has so many? A. None others.

Q. What is the policy of the Board with respect to increasing licenses for cabs in Morristown?

Mr. Stallman: I object to that.

The Court: Objection sustained.

Mr. English: Your Honor will allow me an exception, please.

Exception noted.

Exception allowed.

Q. Have you granted any new licenses recently in the last year or two? A. No, even prior to the time of the Lackawanna Railroad entering into contract with Welsh it was the policy of the Board not to issue more licenses, as the Board at that time felt there were too many, if anything. That is prior to Mr. Potts' term of office.

Q. Since that time have any new licenses been issued? A. None.

Q. What would be the effect of the issuing of new licenses on the existing licenses?

Mr. Stallman: I object to that, if your Honor please.

The Court: Objection sustained.

Mr. English: I pray an exception.

Exception noted.

Exception allowed.

Q. You have been in Morristown a good many years; do you remember back to the days of horse drawn vehicles? A. I do; very well.

Q. So far as the capacity of one licensed cab to take care of traffic is concerned, how did the horse drawn compare with the present motor taxi-cab?

Mr. Stallman: I object to that.

The Court: Objection sustained.

Mr. English: The reason I asked that is this, Welsh testified—

The Court: We don't require expert testimony as to that. Conditions in Morristown are no different from what they are everywhere else. Anybody who has kept a horse and kept an automobile knows they can do many times

as much work with an automobile as they can with a horse.

Mr. English: The reason I brought it up is you may remember some testimony yesterday of Mr. Welsh to the effect that some years ago there were thirty-five, and the inference sought to be adduced was now the Town has grown there ought to be more. It is not necessary to have more because your motor vehicle can do so much more than your old time horse.

The Court: You don't need any evidence on that, I think.

The Witness: You expressed surprise yesterday at that. I believe the taxicabs have not increased in the last ten years.

The Court: That was not Mr. English's question.

Q. Back in 1913 or 1914 did you have motor taxicabs? A. Only a very few.

Q. Most of them were horse drawn? A. Yes.

The Court: So the number of taxicabs has increased in the last ten years?

The Witness: The ability to handle the service, Judge.

The Court: The actual number of taxicabs, because you say there were very few ten years ago.

The Witness: Oh, yes.

I don't know as it is permissible or not, but may I make a statement as to the conditions prior to January 1, 1923, at the station? I was an alderman at that time.

Q. Yes, I will ask you that. A. The witness who testified previous to me was not in office and so was not paying special attention to it.

Q. I will ask you that. What were the conditions, the taxicab conditions from your observation at the Morristown station prior to January 1, 1923? A. I considered them very good. I took the taxicabs very often, and I always found the taxi men standing by their cars. The two or three taxicabs closest to the plaza, not the plaza but the shelter house, might be standing together, two or three men, because their taxicabs were very close, but the others, that might be eight or ten or a dozen men down the line, I always found I had to walk down the line before I could pick out the man I wanted, and who was always accustomed to take me. I would find him down there, and sometimes I wouldn't know whether he was down the line further and I often took another man just as good as the one I was accustomed to using.

Q. What about conditions on the elevated platform and in the lobby or tunnel? A. I never saw any of the men in either of those places.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Of course, you were not down there between trains to see these fellows loafing in the waiting room and toilet rooms, and that sort of thing? A. I have been in the station many times between trains; yes.

Q. You never saw that? A. Never saw it at any time in the last twenty-five years I have been commuting.

Q. Did you say, Mr. Todd, that after the injunction was granted by the Court of Chancery and the taxicabs were removed from the plaza there was confusion? A. The Court of Chancery—I am not familiar with the courts, which is that court?

Q. The first injunction was granted in January, 1923. Did you say there was confusion after that? A. Why, the taxis driving up to the station, mixing with Mr. Welsh's, yes, on account of two taxicab stands.

Q. What was the cause of that confusion? A. Why, the cars coming from two separate stands I assume was the chief cause, not because there were too many cars there.

Q. That confusion could have been avoided, if the men had gone around the flower bed? A. I do not consider that plan feasible in any way.

Q. That confusion would not have occurred if the taxicabs had gone around the flower bed, would it? A. I think so, yes.

Q. They would not have met head on, would they? A. No, there would have been two separate lines instead of one line.

Q. And the fact you put a taxicab stand at Lackawanna Place and had them drive right up against Welsh's cabs is what made the confusion, isn't it? A. Welsh's cabs driving up against our taxicabs caused the confusion.

Q. You say there is not enough business done in Morristown to warrant forty odd taxicabs? A. I don't think so, no, sir; I believe about thirty-five would be sufficient.

Mr. Stallman: That is all.

HERBERT C. WILDEY, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Chief, you are the chief of police of Morristown? A. Yes, sir.

Q. How long have you been chief? A. Approximately three years.

Q. How long have you been on the police force? A. Starting my eighteenth year.

Q. So you were on the police force at the time of the completion of the work under the elevation contract? A. I was.

Q. Who was Mayor at that time? A. Mayor Todd.

Q. Have you any knowledge as to whether he designated any hackstand on the station driveway? A. I have.

Mr. Seager: We have not disputed the other testimony he has given. I submit it is cumulative, repetition, and object to it.

Mr. English: That one question is cumulative and repetition, but I can't put everything in at once.

The Court: All right.

Q. What is your answer? A. He did.

Q. Did you have any orders from the Mayor; did the police department have any orders from the Mayor to police the station plaza with respect to traffic? A. Yes.

Q. Did you personally have anything to do with carrying them out? A. Yes.

Q. What? A. Supervised it.

Q. What was done down there? A. There was a hack stand designated and taxi drivers were ordered to conform to certain rules, which they did.

Q. How long did that keep up to your personal knowledge? A. Kept up until the present injunction proceedings started.

Q. Until this controversy began? A. Yes.

Q. Growing out of the Welsh contract?

The Court: We ought to have that date, when the controversy actually started.

Mr. English: The date of the Welsh contract is December 28, 1922, and I think that is by common consent, that is when the whole controversy began.

The Court: Yes. I only don't want it to appear on this record the condition existed up until the time when my injunction was granted.

Mr. English: No, it didn't. There were previous litigations in the New Jersey Court of Chancery and certiorari and a variety of things.

Q. Did you ever as a police officer of the City of Morristown in charge of the supervision of that traffic, or the officers regulating traffic at the station hear or hear of any objection from the Railroad Company to the activity of the police down there? A. From the Railroad Company?

Q. Yes. A. No.

Q. Until this controversy arose? A. None whatever.

Q. Have you as chief of police given any consideration to the traffic problem down there? A. Considerable.

Q. Working in conjunction with whom? A. With the Mayor and the Board of Aldermen.

Q. Police committee? A. Yes.

Q. From the experience which you have had with the traffic problem down there where in your judgment is the best place for the location of a hackstand on the east side? A. On the northeasterly stand, the place at present that is in contention.

Q. Is that the same place Mayor Todd designated and operated for some ten years? A. Yes.

Q. Why do you think that is the best place from the traffic standpoint? A. Because it is easily approached from the platform, the alighting passengers don't have to travel out of their way, go out in the elements. They can walk direct to the taxi.

Q. Is it easily visible as you go down through that tunnel? A. Very much so.

Q. What about the situation down on Lackawanna Place where the evidence shows the public cabmen are now parking? A. A person alighting from the train has to go out in all kinds of elements. It is all right in fair weather, you don't mind walking, but in inclement weather you are liable to get somewhat dampened.

Q. The map indicates a bend in the elevation wall there; does that have anything to do with the opportunity of seeing the cabs, to a stranger who comes? A. Yes.

Mr. Stallman: What is that?

The Witness: Looking out—Lackawanna Place, Mr. Stallman.

Q. Now, chief, you know of the injunction this Court made which prohibits the defendants in the suit from parking on what we call the old Mayor Todd public hackstand? A. Yes.

Q. Where does Mr. Welsh park his cabs? A. On that stand.

Q. How many does he have up there? A. Four or five. I am not just certain. He has different numbers at different times.

Q. From your knowledge of the situation there at the station how does that affect the traffic conditions at the station with Mr. Welsh parking at one place and the other cabs parking down at Lackawanna Place?

Mr. Stallman: We object to an opinion.

The Court: Yes.

Mr. English: I asked him his knowledge.

The Court: What he has observed.

Q. You know Saw Mill Lane, Chief? A. Yes, sir.

Q. How long have you known it? A. Ever since I have been in the Town of Morristown.

Q. Any business houses or anything up there to make people come and go? A. Several.

Q. What are they? A. There is the Farm Produce Exchange; there is the Swift Beef Company; there is the Morristown & Erie terminal and directly on the egress, the exist from the disputed plaza is the American Railway's express office.

Q. Is there some new building going up there, a warehouse or something? A. Yes, there is some storage warehouse, I think some feed company or something.

Q. It appears from the map for a person coming out of Saw Mill Lane he can strike Morris Street either by going under the Lackawanna tracks by the present freight house or he can drive down to Lackawanna Place and strike Morris Street by going south; that is true? A. Yes.

Herbert C. Wildey. Called by Defendants. Cross.

Q. Is there much traffic that goes over both those routes to Morris Street? A. Under the present conditions, under the injunction restraint there is considerable confusion there; they going haphazardly and all ways.

Q. How much traffic is there which has occasion to go into Morris Street through Lackawanna Place? A. Through Lackawanna Place?

Q. Yes. A. Quite considerable.

Q. Does it go up around by Lumber Street or down by the station wall? A. They stay pretty well on the plaza, around that island.

Q. And that is on the driveway that is in dispute in this case? A. Yes.

Q. Prior to the controversy in question, and beginning with the regulations laid down by former Mayor Todd have you any knowledge as to whether there are signs on the station plaza directing traffic? A. Prior to Mayor Todd?

Q. Since Mayor Todd and prior to the controversy. A. Yes, sir; there are several of our directional signs there now.

Q. Prior to the railroad coming into the situation with its contract with Welsh did the police enforce regulations in accordance with those signs? A. Yes.

Q. Who put up the signs? A. The police department.

Q. The police. Who maintained them? A. The police department.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Mr. Wildey, up to the time this contract was made with Welsh do you say there were police officers at the Morristown station? A. Yes.

Q. At what time of the day? A. At any and all times, we haven't stated times, the motor officers are directed to go through there at any time they are down in that neighborhood, and especially at train time.

Q. Now, as a matter of fact, there was no police officer stationed there up to January 1, 1923, except for about an hour in the evening; isn't that true? A. No, sir; it is the most nonsensical statement I ever heard you make.

Q. Well, did you send a police officer down there with any instructions that he go down there in the morning with instruction to stay there? A. To stay there completely?

Q. Yes. A. No, sir.

Q. There never was a police officer assigned to those station grounds? A. Yes.

Q. To stay there during the day? A. Oh, to stay there the twenty-four hours?

Q. No, we will say from nine in the morning to six at night. A. No; he was only sent there at certain intervals.

The Court: Isn't that just exactly what Mr. Stallman asked you in the first question?

The Witness: No, sir.

The Court: I think it was, and you took it upon yourself to characterize his statement in a way which was quite improper for you to do.

Q. What did you mean to have the court understand when you spoke of the express office on Saw Mill Lane? A. On Saw Mill Lane?

Q. Yes. A. The American Railway's express; I suppose that is part of the Railroad affairs there.

Q. You know they are on railroad ground, don't you? A. We are talking about the traffic going out that way, I said.

Q. You remember Mr. English asked you what business houses there were in Saw Mill Lane, and you said the beef house and the Morristown & Erie terminal and the express company? A. Yes.

Q. You know the express company is on the station grounds on land belonging to the railroad, don't you? A. I wouldn't dispute that.

Mr. Stallman: That is all.

REDIRECT EXAMINATION BY MR. ENGLISH:

Q. Do the public have occasion to go to that express office? A. Considerably, to quite an extent.

Q. Prior to the bringing of this suit do you remember—

Mr. Stallman: I would like to ask that that question and answer be struck out because it involves a conclusion of law. The public dosen't go to an express office, only those people go to an express office who have business with the Express Company, as our tenants, and the statement of the witness that the public go there is manifestly not true because it is a conclusion.

Mr. English: I suppose any of us is part of the body politic. If I take a package to the express office I am one of the public going there.

The Court: No; you are a business visitor going to the express office.

Mr. English: I would be characterized as part of the public.

The Court: Your rights of ingress and egress depend upon your doing business at that place.

Mr. English: That is true enough, sir.

The Court: Your rights are not the rights if this be private property, I don't say it is, but your rights are not the rights which the public have, for instance, in a park.

Mr. English: Oh, no.

The Court: For instance, here on East State Street one has a right to walk, if one walks in such a way the city may not say he is a loiterer or what not and put him off the street.

Mr. English: The Express Company is a quasi public corporation that has to receive packages from any member of the public.

The Court: So is the Railroad Company.

Mr. English: The only point was with respect to traffic, not to quibble about whether it was public or private.

The Court: I think you called for a legal conclusion in your answer, which I don't think you intended.

Mr. English: No, I didn't want any legal conclusions. I wanted a statement about the traffic conditions especially with reference to the—

The Court: Ask him if people go to and from there.

Q. Does the fact there is an express office there cause people to go to and from? A. Yes.

Q. Does that increase traffic on the station driveway? A. Yes.

Q. I was going to ask you about the ordinance passed last October; you know about the ordinance restoring the hackstand to the place Mayor Todd had it? A. Yes.

Q. That by its terms required the hackmen to stand by their cabs to solicit? A. Yes.

Q. Prior to the filing of the bill and the injunction in this suit did you have occasion to observe the operation of that ordinance? A. Yes, sir.

Q. Acting under orders? A. Oh, yes.

Q. From whom? A. Acting under orders.

Q. From the Mayor? A. Yes.

Q. Did you check up and see what took place down there? A. Yes.

Q. What did you find? A. That they conformed to the rules and regulations. Probably when the officer didn't happen to be there they might have let down a bit. The same condition prevails there that prevails most any other terminal depot.

Q. Do you know after the enactment of the ordinance last October the hackmen swarmed up on the platform, on the elevated platform and did things of that kind? A. They did not.

Q. Or crowded into the lobby, as they call it, that tunnel? A. No.

Q. Did you ever hear any complaints of any such action on their part from anybody? A. No.

RECROSS EXAMINATION BY MR. STALLMAN:

Q. How do you know they didn't go into the lobby and on the platform when you weren't there? A. From personal observation, counsel just asked me.

REDIRECT EXAMINATION BY MR. ENGLISH:

Q. Did you have officers down there detailed by you? A. Yes, sir.

Q. What did you do to check up on them and see whether they carried out your instruction?

Mr. Stallman: I object to that.

The Court: Objection sustained.

Mr. English: What he did, your Honor, as bearing on his capacity to answer.

The Court: I think it is immaterial; I think he must testify as to what he observed and then of course the force of what he observed depends upon the opportunities which he had to observe.

Mr. English: I was driving at that very thing.

Q. Having detailed officers to be down there what personal attention did you give the situation at the station plaza? A. I visited the place quite often to see whether my orders had been carried out.

Q. Day time or night time, or when? A. Both.

Q. What did you find as a result of those visits? A. Found that things were normal.

Q. The way you have described them? A. Yes.

ARTHUR N. MEEKER, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. You are a police officer of the Town of Morristown? A. I am.

Q. How long have you been so? A. In the eighteenth year.

Q. Ever been detailed at the station, Lackawanna Station? A. Yes, sir.

Q. Since the track elevation? A. Yes, sir.

Q. How often, do you suppose? A. Well, you mean on the beat there or detailed right there?

Q. Well, both, either one or the other? A. Why, I have been there to meet different trains at times and one time I was stationed there for quite a while.

Q. Do you remember when Mayor Todd fixed that parking place? A. Yes, sir.

Q. Cab stand along the easterly wall? A. I do.

Q. That continued for some ten years, that cab-stand, it stayed there for about ten years, didn't it, the one Mayor Todd fixed? A. Let's see, it must have been around ten years, yes, because it is about twelve years since the station was there.

Q. Were you as a police officer down there having to do with the traffic? A. Yes, sir.

Q. What did you do? A. Well, at one time we met the trains in the morning and certain trains in the morning and afternoon and evening, when it was my beat there, that was when I was patrolman, I would go down to meet the 7:50, in the morning, 8:00 o'clock, 8:20 and 9:30, and I don't know whether, I think there was another officer on the beat went in for the other trains when we were

off it, met all the important trains leaving and the same coming in.

Q. That is when the traffic was the thickest? A. Yes.

Q. Did you ever observe the hackmen loafing around the station and crowding the passengers and bothering passengers? A. Never.

Q. Ever had any complaints of such conduct on their part? A. Not to my knowledge I haven't.

Q. You know Saw Mill Lane, I suppose? A. Yes, sir.

Q. Do you know whether there is much traffic in and out of it at the present time? A. Couldn't tell at the present time; haven't been down there at the present time.

Q. You are sergeant now? A. Yes.

Q. You are at the desk? A. Yes, sir.

Mr. Stallman: No questions.

Mr. English: That is all, sir.

ANSON R. DURLING, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Q. I think you are a cab driver in Morristown? A. Yes, sir.

Q. How long have you been a cab driver? A. Thirty-three years the 24th of last April.

Q. How long have you lived in Morristown? A. Since 1880, 45 years it will be next spring.

Q. Here is a picture you gave me; what is that a picture of? A. That is a picture of the hackstand

we occupied after the elevation till somewheres in the middle of January, 1923.

Q. That is the same place Mayor Todd— A. That is the taxicabs; mine is the fourth, I think that is me. Mr. Cross took the pictures.

The Court: Mark yours; maybe you don't want to spoil your picture?

The Witness: That won't make any difference.

A. Mr. Cross happened to come along one Sunday afternoon and we were in line. That was before any of this trouble.

Q. And took your pictures all lined up? A. He said "How would you like to have your pictures taken," he said, "I will do it for fifty cents apiece." We all lined up and had them taken. That was two years ago last October.

Q. That is right along that easterly wall? A. Yes, sir.

Mr. English: I offer this in evidence.

The Witness: I think them cabs look safe to carry passengers. Mr. Welsh made a statement the old ones were not capable of carrying passengers yesterday, if you recollect.

Photograph received in evidence and marked Exhibit D-7.

Q. Now, you know Saw Mill Lane, Mr. Durling? A. Yes, sir, for forty-five years, will be next spring. I have used it with horses when it was a grade crossing.

The Court: It was a grade crossing?

The Witness: Grade crossing. Hand me that picture and I will show the Judge where the

crossing was. I wouldn't say foot to foot. This is Saw Mill Lane, Morris Street runs down here (indicating), down to the grist mill, runs by Martin and Kasge's, coal dealers, also down in back there on Saw Mill Lane.

Q. And across the railroad at grade? A. Grade crossing right near where—

The Court: Where the tunnel is?

The Witness: The Lackawanna had a flagman and gates there also, up to the present elevation.

Q. Did you ride straight into Morris Street in those days? A. Straight to Morris Street along the stone wall where the freight house at present stands.

Q. Anybody live up there? A. Six houses in there, three in the location where the Swift Beef Company is, family by the name of—

Q. I don't care about their names. Anybody else live up there? A. Three on Saw Mill Lane that lives on down towards where the Morristown round house is at the present time, there was a grist mill there.

Q. The people don't live there now? A. They are all—

Q. Business places? A. Yes, sir.

Q. At the present time is there much traffic in and out of there? A. Yes, sir, a great deal.

Mr. Stallman: I object to that. Counsel is leading his witness. Why don't you ask him how much traffic is there?

Q. What about the traffic in and out of Saw Mill Lane? A. The traffic is very heavy.

Q. Where does it come from and go to? A. It goes to the American Feed Company located in there; it goes to the Farmers' Exchange Feed Company located in there, Swift beef house, Lory's ice house and the Consumers' Coal Company and the Morristown and Erie Railroad Station, freight station.

Q. How long to your personal knowledge has traffic been going in and out of Saw Mill Lane into Morris Street? A. How long?

Q. Yes. A. Ever since I lived in Morristown.

Q. That is forty-five years now? A. It will be next spring.

Q. When you go into Morris Street from Saw Mill Lane at present you can go two ways, can't you? A. At present, yes, sir.

Q. Which ways? A. In from Lackawanna Place or from off of Morris Street or from Morris Street by the freight depot very near opposite King Street.

Q. Does traffic go both ways? A. Yes.

Q. Have you seen it? A. Yes, sir.

Q. And the traffic that goes through Lackawanna Place, how does that get into Saw Mill Lane? A. Lackawanna Place, sometimes they go along what you call Lumber Street but more times they go right in where the picture shows the plaza.

Q. Is that the driveway at the station? A. No, sir, the plaza on the, in front of the hack stand between the triangular park and the hack stand, where we were located for ten years.

Q. You know the ordinance the town passed last October? A. Yes, sir.

Q. That stationed you back there on Mayor Todd's old hack stand? A. Yes, sir.

Q. Do you know whether the men obeyed that ordinance with respect to standing by their cabs? A. Yes, sir.

Q. Did they swarm up on the elevated platform? A. No.

Q. Get in the lobby or tunnel? A. No, sir, they did not. The gentleman swore yesterday they did. I never met the gentleman before. He said he would give us all orders different times, Mr. DeMott from Kenville; never met the gentleman; never seen him; never spoke to him in my life; I have been there thirty-four years.

Q. Didn't see him getting off there twice a week? A. No, sir; I did not.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Mr. Durling, is traffic on Morris Street quite heavy? A. What did you say?

Q. Is the traffic on Morris Street in the vicinity of the railroad station quite heavy? A. Yes, sir.

Q. Do you know whether or not the Town of Morristown customarily stations a traffic officer anywhere on Morris Street during the day? A. Yes, sir.

Q. Whereabouts? A. Every morning before the departure of the 8:20 eastbound, when people come down from Elm Street; some of them commuters come a little late, come down there traveling pretty lively, there is an officer there to stop traffic up and down Morris Street, so they can cross Morris Street to go up the eastbound track.

Q. When does he leave there? A. He stays there until 9.30, around that location.

Q. After 9:30? A. And then they come back again at three.

Q. Wait a minute. Between 9:30 in the morning and 3:00 in the afternoon there is considerable traffic on Morris Street? A. This is the patrolman in the motor cycle and—

Q. Suppose you answer my question. Between 9:30 in the morning and three in the afternoon there is quite heavy traffic on Morris Street, is there not? A. Through traffic but not so much to the station.

Q. On Morris Street? A. On Morris Street, yes, sir; all parts of Morris Street.

Q. There are trolley cars going up and down? A. Yes, sir.

Q. And all the truck traffic and vehicular traffic going over in the direction of Whippany goes past that point? A. Correct.

Q. There is no traffic officer there between 9:30 in the morning or three o'clock in the afternoon? A. Motor cycle cops goes up there frequently every ten or fifteen minutes; they direct that traffic.

Q. Did you understand my question? A. I did; yes, sir.

Q. Why don't you answer? A. When it is straight traffic they ain't going into the station.

Q. I didn't ask you anything about going into the station, Mr. Durling. I asked you about the traffic going up and down Morris Street in Morristown. A. I say yes, sir.

Q. Now do you understand me? A. Traffic is heavy.

Q. And there is no officer stationed there during the day, that is between morning and late in the afternoon? A. Not to stay right in one place, but they go up and down.

Q. All right. There is no traffic officer stationed anywhere on Morris Street from the town limits

on the south clear up to the park during the day, is there? A. At times they are at certain corners when the traffic is the heaviest.

Q. Where during the day is there a traffic officer stationed in the Town of Morristown except on South Street up at the park? A. Corner of Spring and Water Street, corner of Morris and Spring Street.

Q. What time of the day? A. Different times; I am not an officer to keep tabs to see just what time they are there. I am driving up and down all over town. I see them at different times.

Q. Is Morris Street one of the main streets of Morristown? A. Yes, sir.

Q. It is where the trolley line runs to? A. Yes, sir.

Q. There is no traffic officer stationed by Morristown on Morris Street except in the vicinity of the station during the commuters' hours, is there? A. At the junction of Elm and Morris, the most conjested corner.

Q. Now, of course the traffic on Morris Street is very much heavier than it is on Saw Mill Lane? A. Why, certainly.

Q. About ten times as heavy? A. Certainly.

Q. About twenty times? A. I couldn't say it is that because I don't keep count.

Q. How would you characterize the traffic on Morris Street, as very heavy? A. I told you it was heavy.

Q. Would you characterize the traffic on Morris Street as very heavy? A. Very heavy?

Q. Yes. A. Not as much so as some other streets we have in town.

Q. Supposing I asked you, Mr. Durling, how is the traffic on Morris Street, it is very heavy or not,

what would you say? A. I would say it would be heavy.

Q. Not very heavy? A. I would call it heavy traffic, certainly; yes, sir.

Q. But not very heavy, would you? A. I would call it as I told you, heavy.

Q. But not very heavy? A. At the present time the automobiles is in existence; I drive all over the country; traffic is pretty heavy wherever you go.

Q. After you have said all that are you willing to say the traffic on Morris Street is very heavy? A. I would call it heavy, yes.

Mr. Stallman: Do you think the witness ought to answer my question?

Mr. English: I think he does answer it.

Q. Will you put the word "very" in your answer?

The Court: He says no.

A. I says "heavy."

Q. You say the traffic on Morris Street is about fifteen times as heavy as it is— A. I would say I never took count.

Q. Ten times you admitted. A. I couldn't answer that question.

Q. It is very much heavier? A. Couldn't answer that question properly unless I stayed there and made a memorandum of it.

Q. You have never done that? A. That is not my business.

Q. Your observation is that the traffic on Morris Street is very much heavier than it is on Saw Mill Lane. A. I said the traffic up Morris Street was heavy.

Q. How does it compare with Saw Mill Lane? A. Saw Mill Lane is altogether different from a main thoroughfare like Morris Street.

Q. Yes; what did you want the Court to understand when you told him that the traffic on Saw Mill Lane was very heavy? A. Go into business houses, good deal the same as a side street.

Q. What did you want the Court to infer when you testified under oath that the traffic on Saw Mill Lane was very heavy? A. I didn't say it was very heavy.

Q. You didn't mean that? A. You tried to claim Saw Mill Lane is a driveway to the passenger station only, and it is a driveway, it has been used as a highway forty-five years to my knowledge to business houses and private houses also.

Q. Do you remember Mr. English's asking you whether there was heavy traffic on Saw Mill Lane, and you said yes, it was very heavy? A. I said there was heavy traffic at times when the business and passenger vehicles was going at the same time.

Q. That is what you want us to understand. Do you want the Court to understand, Mr. Durling, that no taxicab man ever went in on the station platform to solicit business, to your knowledge? A. I have never, I couldn't answer that question. Did I ever see them, no, I defy anybody—

The Court: You always stay by your cab?

The Witness: Yes, you bet I do.

The Court: You don't know what the others did?

The Witness: That is what I was going to say; I didn't keep watch of them; but not to my knowledge.

Q. You don't know whether any cabmen ever went in the waiting room and lounged around there between trans? A. No, sir.

Q. You never knew that? A. No, sir.

Q. You never saw the cabmen going into the smoking room, the toilet rooms and lounging around? A. I never watched what they are doing; I watch my business is with my cab, looking for fares; I couldn't be in the depot and all over and look for a fare and get it.

Q. You never saw three or four or five or six or more cabmen stand on the platform down at the end of the tunnel and yell out very loudly for— A. The platform is not down there by the tunnel; the platform is up on the upper level; that is the sidewalk down on the lower level.

Q. There is a place for passengers when they come down the steps to walk out of the tunnel out on the sidewalk, isn't there? A. From the subway, yes.

Q. Yes, from the subway, and did you ever see the taxicab men on that sidewalk? A. No, sir.

Q. Never saw a taxicab man on that sidewalk? A. No, sir.

Q. In front of that tunnel? A. There might be between trains but when there is a train come in and a passenger coming we all has our cabs, each one stays by his own because the city ordinance calls for that.

Q. How about the ordinance two or three years ago? A. Been that way ever since 1888; the ordinance passed says taxicab men must not leave their vehicle except for baggage while waiting for employment at the railroad station.

Q. You never saw that rule violated by anybody? A. They might step in between trains; have to go

maybe to get a paper; there is other necessaries a person has to attend to.

Q. That is the only thing you ever saw? A. Yes, sir.

A recess was here taken until two o'clock.

AFTER RECESS.

NATHANIEL C. TOMS, sworn on behalf of the defendants, testified as follows:

Mr. English: Your Honor, yesterday there was marked in evidence as D-3 the ordinance of the Town of Morristown adopted July 16, 1878, and I specifically called attention to section 14 of the ordinance. In addition I would like to call attention to section 13 (reading). Yesterday your Honor will remember in connection with one of the discussions we had I referred to an ordinance to adopt the survey and map of Saw Mill Lane and to provide for the filing and recording of said survey passed May 16, 1882, recorded in Book E, page 433.

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Toms, are you the Town Clerk of the Town of Morristown? A. I am.

Q. And as such have you custody of the records of the Town? A. I have.

Q. Did you examine Book E of the minutes of the Town, page 433? A. I did.

Q. I suppose that was long before your time, back in 1882 or thereabouts? A. I was on earth but I wasn't Town Clerk.

Q. Did you make a copy of the ordinance relating to Saw Mill Lane? A. I made a copy of the minutes relating to the ordinance from the introduction and passage and the ordinance itself.

Q. Is this paper which you produce a true copy? A. The paper I copied myself.

Q. I suppose the book itself is a great big book, isn't it? A. Large book.

Mr. English: Any objection to this, as far as the formal proof goes? He says it is a true copy of the original.

Mr. Stallman: I wouldn't object to the form of proof. What I do object to is the introduction in evidence of this paper because it doesn't indicate where the lane known as Saw Mill Lane and therein referred to begins or ends or just where it is. It might refer to some section of it a mile away from the place in controversy.

The Court: I don't see the materiality. It seems to me the rights of the Town of Morristown in the place must depend upon the agreement rather than anything that preceded the agreement.

Mr. English: My thought on the matter is because of the language of the agreement which required the railroad to lay out this driveway on the station plaza required that it be kept open for persons going to and fro to the railroad station and "for the use of those now having rights of egress to Morris Street in Saw Mill Lane."

The Court: I don't think there is any dispute but what the railroad must keep it open. The question of having those rights, the Railroad Company goes further and says, "We are going to establish a cab stand here because this is a public place."

Mr. English: Yes; that is true. A further reason, your Honor, as counsel yesterday tried to claim, although I don't think he succeeded at all in proving his claim that Saw Mill Lane was not a street. This has a bearing on that contention.

Mr. Stallman: I said where it crossed the railroad property.

Mr. English: It is shown on the map in evidence as part of the elevation contract where it crossed the railroad property. It is shown on one of your deeds in evidence.

Supplementing what—

The Court: Then we get back to the objection Mr. Stallman makes that the paper which you seek to offer in evidence does not give the bounds of Saw Mill Lane.

Mr. English: No, refers to a map.

The Court: And as being immaterial to this issue.

Mr. English: The paper I offer refers to a map. Of course the map is one the file with the County Clerk of Morris County and is not here. It is in that official custody, and I proposed to ask Mr. Toms next if he has examined the records in the Clerk's office to find out whether or not the map was filed.

The Court: Suppose we ask him that.

Q. What is the fact; was the map filed? A. It was.

Q. The map that is referred to in this ordinance? A. Yes, sir.

The Court: Have we a copy of the map?

Mr. English: Not of that map, no, sir. I think we have practically the same map annexed to one of Mr. Stallman's deeds which he put in, Exhibit C-10. I can ask Mr. Toms whether that is the same map.

The Court: How does he know?

Mr. English: He looked at it. He can testify from his inspection first of one and then of the other.

Q. Did you have this with you last night, this C-10? A. That is Mr. Stallman's exhibit; I didn't have it.

The Court: Well, I don't think it is very good proof.

The Witness: I will state there is evidence on that map which was on the other map which puts me in a position I can definitely state whether that map shows Saw Mill Lane as on the map on file.

Q. You can testify to that, can you? A. There are things on that map which are on the other map which puts me in that position.

The Court: Mr. Stallman, if the map were here would you think this was admissible.

Mr. Stallman: No, I don't think so; I think it is irrelevant, certainly as your Honor pointed out, and I have made the objection so often I feel ashamed to repeat it, that what-

ever individual rights there may be in persons in Saw Mill Lane is a matter for them to protect if it is ever questioned, but that part of the contract does not attempt to vest any right to confer any privilege to recognize anything in the Town of Morristown. Now, the lane went to a grist mill or something like that; we have had the evidence. The contract in question upon which counsel stresses so much says that Saw Mill Lane shall be vacated, and then because of the doubt of its legal existence there was added "or so much thereof as may exist as a public street," and it was vacated; so it seems to me it is beyond a question, it is not decisive of any issue in this case.

The Court: I don't think it is helpful at all.

Mr. English: Will your Honor permit me to mark the ordinance for identification?

The Court: Yes.

Mr. English: I offer it in evidence; your Honor overrules it and I pray an exception.

The Court: Yes, sir.

Exception noted.

Exception allowed.

Mr. English: I offer it for identification.

Paper marked D-8 for Identification.

Mr. English: There is another thing I want to ask Mr. Toms that I forgot.

Q. Mr. Toms, I show you Exhibit D-1 for identification, which is the report of the police committee; is that a part of the official records of the Town (indicating)? A. It is.

Q. Relating to the ordinance referred to in the bill of complaint? A. It is the petition which was referred to in the preamble of that ordinance.

Q. And was filed at the time the ordinance was introduced? A. Filed with the ordinance. The committee, the police committee introduced the ordinance and filed this report with it.

Mr. English: I now, with your Honor's permission, would like to renew the offer of the report in evidence here, D-1 for identification.

Mr. Stallman: We objected to it yesterday and it was after the—

Mr. English: It was overruled, and I put in some more testimony and renew the offer.

The Court: I can see nothing which would justify the Court's reversing himself.

Mr. English: Very good. Once more I may respectfully pray an exception.

Exception noted.

Exception allowed.

HENRY L. LADEN, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. You live in Morristown, Mr. Laden? A. I do.

Q. For how long? A. About thirty years.

Q. Thirty? A. Yes.

Q. What is your business? A. Taxicab.

Q. How long have you been in the taxicab business? A. About nine years.

Q. Where is your place of business in Morristown? A. At the Lackawanna Station.

Q. During the time you have been in business there have you been licensed by the Town? A. I have.

Q. What time in the day do you appear at the station? A. Well, I should judge sometimes about nine or nine-thirty, because I have a good deal of early train work to do, and I don't have a chance to get to the station.

Q. When you get to the station what do you do? A. Oh, sometimes I wait there for the arrival of the 10:20 or the 9:40, in case I don't get a call between; I often get calls between.

Q. Yes? A. Yes.

Q. And then what do you do when the train comes in? A. Oh, why I stay by my car and solicit, just as everybody else.

Q. Do you know the other taxicab men who conduct a business at the Lackawanna station? A. I do.

Q. And tell us what you know about their habit with reference to conducting their business there. A. Well, the majority of them at large is something like myself; they have a good deal of private work; that is what I mean to say over the telephone from their homes, and they go off on various calls just the same as I do; a great many times we have calls just as the train is coming in, and we don't have time to wait for the train; we have to pull right out at the time the telephone call comes in.

Q. When you do wait for the train what do you do with reference to soliciting patronage? A. What do we do?

Q. Yes. A. Stay by our cars and solicit them at our cars.

Q. Do you go in the station? A. Oh, no, nothing like that.

Q. In the tunnel; is that what they call it, the tunnel? A. No, we don't go in there.

Q. It has been testified in this case that the taxicab men congregate on the platform and exits or at the exits and conduct themselves in a disorderly, boisterous and loud manner; what have you to say about that? A. I say it is untrue.

Mr. Bolitho: Cross examine.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Do I understand you to say, Mr. Laden, your place of business is at the Lackawanna Station? A. No, you didn't understand me to say my place of business was at the Lackawanna station.

Q. Where you conducted your business? A. That is where I said I conducted my taxicab business, from the Lackawanna station.

Q. Up to the time that the injunction in this case was issued you brought your taxicab on the Railroad Company's property, did you? A. What do you mean, prior to the time it was issued?

Q. Yes. A. Sure, I did.

Q. And you parked it alongside of the sidewalk that runs down to the shelter house between the shelter house and the under-crossing? A. Yes, I park there with the authorities of the town.

Q. What is that? A. I park there with the authorities of the town.

Q. Never received any permission from the Railroad Company to do that, did you? A. No, I didn't.

Q. And you would generally get down there with your cab about nine or nine-thirty in the morning? A. Sometimes; I can't say just exactly at all times

because sometimes I don't get there at all in the morning.

Q. Yes. And you conducted your business from that place practically all day long, did you? A. Well, no, I don't all day long, it is only a place of fill in, don't you know, for me; really the bulk of my business is right from home there over the telephone, and the station is a half way ground, a fill in place.

Q. You meet practically all trains during the day? A. I do not.

Q. You, of course, meet all the evening trains? A. I do not.

Q. No? A. No.

Q. What trains do you meet in the evening; what time do you get there as a rule in the afternoon? A. Well, sometimes I meet the 6:11 mostly, it is an express train; I meet the 6:11 and sometimes the 6:16, and after the 6:11, 6:16 it is very seldom I meet any other train. I accidently run in sometimes for the 9:21 but after that I don't come down unless it is an appointment.

Q. In meeting those trains you take your taxicab down, park it along the curb and solicit the people as they come out of the station? A. No, I do not.

Q. How do you solicit them? A. What you mean, how I do it now? I solicit from Lackawanna Place, where I am stationed now.

Q. When you were on the Railroad Company property how did you solicit these folks? A. Just set down and give them my finger like that (indicating).

Q. Point your finger at them? A. Yes.

Q. Is that all you did? A. Yes, not neecssary to do any more, because I am old hackman and I am well known.

Q. Ever say "taxi" to them? A. Oh, yes; I have said "taxi".

Q. Did you say it just that way? A. "Taxi"; yes.

Q. Any louder than that? A. Not to my memory. The chances are I didn't keep any record as to how loud I say "taxi".

Q. Some of the other boys were around there also calling "taxi"? A. Yes.

Q. In fact, quite often there were four or five of you all calling "taxi" at the same time? A. I don't know about that.

Q. You didn't count them or didn't see them or what; why don't you know, you are a pretty bright fellow. A. I only know about myself; I couldn't say about someone else.

Q. You didn't hear these other boys call "taxi"? A. I have heard them say "taxi", don't you know, but not out of the ordinary.

Q. And these people you were saying "taxi" to were not down near your cab but up on the elevated platform? A. Yes, up on the elevated platform.

Q. "Taxi", you didn't whisper it to them.

Mr. Bolitho: Is that a question or a comment?

Q. There is considerable competition between all of you men, isn't there? A. Well, I don't know just whether it is or not.

Q. You understand what I mean, of course? A. Yes, I think I do.

Q. The Mayor and Mr. Coggeshall yesterday testified there is about forty taxicabs in Morristown, and they consider it is too many, that there are too many of you men there, more of you than are necessary to take care of the business.

Mr. English: I don't remember the testimony that way. I think they said it was sufficient to take care of the business and any more would be too many.

Mr. Stallman: I will leave it to the Court.

The Court: Is it material either way, whether it is more or whether it is just enough?

Q. Now, isn't the competition pretty keen, as to which of you fellows are going to get the business? A. Are you asking me that question?

Q. Yes. A. Oh, I don't know who is going to get it.

The Court: No; the inquiry is as to the competition; Mr. Stallman wants to know if each of you is not pretty anxious for each fare, each one of you taxi men, if you are not pretty anxious to get a fare at the railroad station.

The Witness: Oh, yes; that is natural, we are anxious to get a fare.

Q. And you do whatever you can to get that business? A. Well, to get a fare you mean?

Q. Yes. A. Oh, well, yes, we do whatever we can that is in reason, nothing out of reason.

Q. Who determines what is in reason, yourself? A. Beg pardon.

Q. You determine what is in reason? A. I think I should know what is in reason.

REDIRECT EXAMINATION BY MR. BOLITHO:

Q. Just a minute. In other words, you do not make yourself obnoxious to the person whom you desire to carry, do you? A. No, I do not.

Mr. Stallman: I think that is very leading.

The Court: I think that is all right.

What about the effect upon persons whom you don't secure as passengers, or secure as fares, what is their feeling, if you know, from what you observe?

Mr. Bolitho: That is a question the Court is asking you.

The Court: I understand a man whom you land is perfectly satisfied to have you land him, but how about the attitude of the fare with respect to the four or five who may be standing calling "taxicab"?

The Witness: Are you asking me that?

The Court: Yes; did you observe anything about the intending passengers, whether they like to have four or five men call "taxi" to them?

The Witness: Well, no, I have not.

JOHN H. TANNER, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. You live in Morristown, Mr. Tanner? A. I do.
Q. How long? A. Twenty years.
Q. Have you been a taxi man that long? A. No.

Q. How long have you been a taxi man? A. Ten years.

Q. Licensed by the town during that time? A. Yes.

Q. Did you also operate at the Lackawanna railroad station in the town? A. I do.

Q. How long have you been doing that. A. Ten years.

Q. What have been your habits with reference to your business there?

Mr. Stallman: I don't think it is material.

The Court: I don't believe it will hurt; I will allow it and allow an exception.

Exception noted.

A. Why, I received my calls, that is calls that come into the station for a cab, fill these orders, wait for trains, when they come in, whenever people want taxicab accommodations if I am in first line, that is if I am at the head of the line the chances are I will get the passenger; if it is somebody that has a choice in line they walk down to that cab, and I never molest anybody or show any animosity toward our fellow cabman because he happens to secure a passenger when he is below me. I have never done it yet.

Q. What will you say with reference to the habit of the cabmen when they are soliciting passengers? A. Why stay by their cabs, of course, because the reason, one reason would be common sense if three or four men got up by one cab and if a passenger came along eventually he would get in that cab; consequently it compels us to stay by our vehicle to let the people know what kind we have got there.

Q. What will you say about soliciting fares in a boisterous, noisy manner at the station? A. Don't do it.

Q. See anybody else do it, any of the other taxi men? A. No.

Q. You said that you stood in line at the station; what do you mean by that? A. Well, as each car is parked in a row, and of course there is a head and a foot, that is the first car that comes in takes first place, that is and of course it is just parking space between the cars.

Q. Where was the place where you parked, was it a designated hackstand or otherwise? A. Yes, it was.

Q. Who designated that? A. Mayor and Board of Aldermen; that is the police informed us where to go, through the instructions from the Mayor and Board of Aldermen.

Q. Was that behind the station near the west-bound track and the shelter house? A. Before the injunction, you mean?

Q. Well, yes, before the injunction? A. Yes, it was.

Q. And now do you mean the injunction from this Court? A. Well—

Q. When you say injunction? A. Well, yes.

Q. Where has it been since the injunction? A. On Lackawanna Place.

Q. And had it formerly been at Lackawanna Place for a short period? A. It had.

Q. Prior to that time where had it been? A. Over on the opposite side of the shelter house.

Q. Anywhere near where it is now? A. Not where it is now; it is where Mr. Welsh's cab stand is.

Q. Where Mr. Welsh's cab stand is, is that where it was before the injunction was issued? Is that where you all parked? A. Yes; that was.

CROSS EXAMINATION BY MR. STALLMAN:

Q. You brought your taxicab down to that part of the Railroad Company's ground and parked it there against the curb, did you? A. The west side of the shelter house?

Q. Yes. A. Prior to the Court's injunctions?

Q. Yes. A. Yes.

Q. You didn't get the Railroad Company's permission to do that, did you? A. We were not authorized by the Railroad Company, so naturally, we had nothing to do with that part of it.

Q. When parking your cabs there have you always backed your cars up to the curb? A. I think so, sir.

Q. Never stood beside your car alongside of the curb? A. No.

Q. Always backed it up? A. I think so.

Q. And then when some fellow would move out of first place you would drive your car out into the plaza and back it up in his place, wouldn't you? A. Yes.

Q. And as you would pull your car out, or as somebody would pull out from the plaza with fares or with passengers at the time they were going out you would have to pull up and back up again? A. No; it was a rule that—

Q. All right. A. Never shift cars while the train was in. Every taxi that went out with a fare, it was the police ordinance that we never shift cars until after all the cars, even the private, had gone from the station. After they had gone, why, then, we shift between the trains.

Q. That is just a recent practice. You didn't do that at all five years ago; did you? A. Did it ten years ago.

Q. Don't you remember time and time again when cars pulled out of that station, the taxicab men would move their cabs to get first in line? A. No, sir; there was no competition for first station; I mean, first position because there was a police ordinance that each car had to follow in line.

Q. When was that ordinance put into effect? A. Ever since I have been in the taxi business.

Q. You compete with the other fellows in this business, don't you? A. I didn't understand you.

Q. You compete with the other drivers for the business of the passengers there, don't you? A. I am there for business.

Q. Yes. You don't have any more business than you need, do you? A. Don't have any more than I need?

Q. Yes. A. I don't think anybody has any more than they need; I don't think I have.

Q. You try to get all the business you can for your own cab? A. That is perfectly natural.

Q. Of course it is. Now, how do you do it; how do you induce people to patronize your cab instead of some other? A. Never tried to that; if a person wants a car and they come down if they don't want the first car naturally they come to the second.

Q. Do you ever say "taxi" or something of that kind to people? A. Yes.

Q. Where are the people when you solicit them, up on top on the platform? A. Well, it depends on the position we have been in; when we were on the opposite side of the shelter house from where we are now, very seldom you ever heard anybody say "taxi" until the people came down, and the first

person would call out "taxi" when they got a fare or if they were about to get a fare then the next one in line. Now since we are over on Lackawanna Place—

Q. I am talking about down on the plaza. A. That is the way it was, yes.

Q. You put your cars in there and you didn't solicit traffic at all; you just waited for passengers to come and employ you? A. Each one in turn.

Q. Each one in turn? A. Yes.

Q. You didn't call attention of the passengers to your presence there? A. That would depend. If it was somebody knew us and looking for us we would let them know we were there sometimes.

Q. For strangers you didn't say "taxi"? A. No. A stranger had a car, took the first car that came.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Since you were down on Lackawanna Place—

Mr. Stallman: I don't think that is material now.

Mr. English: I have a right to cross examine.

Q. Now that you are stationed down on Lackawanna Place, how do you do? A. There are times when the train comes in we stand by our cabs and the people are above us; each person stands by his cab and the chances are he will call out "taxi". He is only about fifteen feet from the person anyway, from the platform down on Lackawanna Place where we are.

Q. You mean the people are fifteen feet over your head? A. I should say about fifteen feet.

John H. Tanner. Called by Defendants. Cross.

Q. Now you have been around there ten years, you say; have you seen policemen around there until the Court made this present injunction? A. Why, yes, the very day I got my license I went down there and a policeman stopped me and asked me if I had a hack license.

Q. Ever since then until the Court made the injunction in this case last November have you seen policemen around the station grounds there?

Mr. Stallman: I object to that as leading.

Mr. English: I am cross examining.

Mr. Stallman: You can't cross examine.

Mr. English: I can cross examine anybody produced by any other party.

Mr. Stallman: It is not an adverse witness.

Mr. English: It is the first time I ever heard a party to a cause could not cross examine a witness produced by any other party in the cause.

The Court: It strikes me they probably can.

Q. During the ten years you were around there until the Court made his order last November, didn't you see policemen around that station platform and driveways? A. Every day.

Mr. Stallman: Objected to as not being cross examination.

The Court: I think that is well taken.

Mr. English: I don't think he can object to that; I think Mr. Bolitho, who called the witness, might properly make that objection if he cares to. It is not Mr. Stallman's witness who is being cross examined.

The Court: I think you must be confined to the lines of cross examination irrespective of who is carrying it on or who objects.

Mr. English: Does your Honor overrule it?

The Court: Yes, sir.

Mr. English: May I pray an exception?

The Court: You may.

Exception noted.

Q. Have you ever seen policemen regulating traffic on the station platforms prior to the injunction in this suit last November? A. I have.

Q. How long, to your knowledge, did that go on during the ten years you were there? A. During the ten years I was there.

Mr. English: That is all.

Mr. Stallman: That is all.

Mr. Bolitho: I will call Mr. Murphy.

The Court: I think there are sixteen of your clients.

Mr. Bolitho: Yes, sir.

The Court: Is it your purpose to put each one of them on?

Mr. Bolitho: No, sir; I have but two more I care to put on. I submit to the Court their testimony will be practically the same.

The Court: That is their testimony will be practically the same as that of the two witnesses you have called?

Mr. Bolitho: Yes.

Mr. Stallman: I am willing to admit, then, on the record if the other two gentlemen are called, outside of giving different names they will testify to substantially the same thing Mr. Laden and Mr. Tanner have testified to.

Mr. Bolitho: Except Mr. Bracey, whom I want to ask a question or two outside of that.

The Court: All right, sir.

Mr. Bolitho: Then Mr. Murphy does not need to be called.

The Court: All right. That is agreeable to you, Mr. English?

Mr. English: Oh, very satisfactory; yes, sir.

LEE BRACEY, sworn on behalf of the defendants, testified as follows:

DIRECT EXAMINATION BY MR. BOLITHO:

Q. Mr. Bracey, you are a taxicab driver in Morristown, also, aren't you? A. Yes, sir.

Q. How long have you been in the business there? A. Fifteen years.

Q. How long? A. Fifteen.

Q. And did you have your taxi stand at the Lackawanna station? A. That is where I first commenced; yes, sir.

Q. Where was it when you first commenced? A. Over on the, before the elevation, over on the front side of Morris Street.

Q. On the Morris Street side? A. Yes, that was before the elevation.

Q. Yes, and after the elevation where did you first have your taxi stand? A. After the elevation, why, the chief of police and the Mayor of the Town and one of the railroad officials and the one of the, the license committee, chairman of the license committee come down and placed us over against the curb of the flower bed over there.

Mr. Stallman: I want to object to the witness' statement of what a railroad official did unless the gentleman is identified; otherwise it is a mere conclusion.

The Court: Yes; I think that point is well taken.

The Witness: He didn't give me his name, just said it is a railroad official; that is as far as I went.

Q. When was that? A. That was when the first of the elevation, when we commenced on that, after the elevation; I don't know, ten or twelve years, somewhere in that neighborhood.

Q. Where was that stand established? A. The first time they placed us over against the curb, what we call the flower bed, the circle there.

Q. Near the flower bed? A. Yes, on that side.

Q. Anywhere near where Mr. Welsh has his stand now? A. Just opposite each other, facing each other; then it was not against the curb of the sidewalk but over the other side for the first day or so, and then they found out the private rigs and ours come in congestion, then they come down and placed us over against the other side next to where the Welsh stand is now.

Q. Is that the place you remained until— A. We remained there until the first injunction, until we were moved away.

The Court: Until the injunction in the Chancery proceeding?

The Witness: Yes.

The Court: Let it read until the injunction of the Chancery proceeding.

Q. Then you were moved where? A. Then we were moved on Lackawanna Place.

Q. Did you go back to the old stand again after the Chancery suit was over? A. Yes; we had another order and then we went back again.

Q. And then after the injunction of this Court were you moved back to Lackawanna Place? A. Then we went back to Lackawanna Place.

Q. Do you know where Saw Mill Lane is? A. I really do, for the last thirty years.

Q. Do you know what kind of a way or road it was during that time? A. Why—

Mr. Stallman: What do you mean by calling for a conclusion of fact or law?

Mr. Bolitho: I was asking him if he knew.

Mr. Stallman: What knowledge are you trying to elicit?

The Court: I think it would be inadmissible if he knew, so I think the preliminary question is inadmissible. He can tell us what he observed with respect to Saw Mill Lane.

A. Why—

Q. Just a minute.

Mr. Bolitho: May I have an exception to that, please?

The Court: Yes, sir.

Exception noted.

Q. Tell us what you saw with reference to Saw Mill Lane during the time you have known it? A. Well, when I first knew it, when I first come to Morristown, not the first few years but when I commenced to drive a wagon, it was a roadway,

and the railroad wasn't elevated, we ran across the track, and they had a flagman there on account of the trains and the traffic, and I was in business, I went over to the meat house. I had to go over there mostly every day and get things from the meat house, and then there was a coal yard over there and feed mill, and other places, but it was what we call just a common roadway so far as I could see; I drove over it backward and forward; and that is all I know, by a stone wall.

CROSS EXAMINATION BY MR. STALLMAN:

Q. You are one of the defendants in this case? A. Yes.

Q. Up to the time the injunction was issued by this Court did you bring your taxicab and park it on the Railroad Company's property? A. I parked it where I was ordered by the police committee of the town. When I first got my license they ordered me to park there, and I always obey my orders; that is where I got my instructions.

Q. You had no consent of any kind from the Railroad Company, did you? A. I didn't have either way; they never bother me anyway, excepting I knew, I knew the Mayor and our town official and they said the other man was a railroad official; that is all I knew about him.

Q. Do you compete with these other men for business? A. I am out there for my living; that is what I am there for.

Q. During the last couple of years have you made your presence known there by calling out to passengers? A. No more than usual way if I see anybody.

Q. I didn't ask you whether it was any more or less; I asked you whether you did it? A. I didn't stand there with my mouth closed; I would say "taxi."

Q. Did you make your presence known to intending passengers? A. Stood by my car and solicit.

Q. Alighting passengers, yes. Did you say anything to them? A. Said "taxi"; sure.

Q. What did you say to them? A. I said "taxi."

Q. Just like that? A. Sure.

Q. Did you wait until they came right close to you? A. If I had a lady and she waived for me to come and get a bag I would get it, or gentleman, either.

Q. How about strangers? A. I didn't know strangers all the time; I would solicit anybody; if they said come I would go.

Q. How many of you men customarily meet these trains? A. I couldn't tell; I only looked out for myself and my boy personally; of course there would be other taxis there but I was looking out for myself.

Q. Did you hear this testimony that there are forty taxicab men in Morristown? A. Did I testify that?

Q. Did you hear that testimony? A. Yes; I heard it.

Q. It is true, isn't it, that in the evening, between say half past five and seven o'clock, about the time the 6:11 express comes in there are twenty or more of your men down there? A. We have three public hack stands in Morristown, and the forty completed at the three stands. They all was never at the Delaware and Lackawanna station as I know of.

Q. Did you hear the testimony of Mayor Potts to the effect that the traffic to and from the Lacka-

wanna station comprised the larger part of the business for taxicab operators in Morristown? A. There is more at the station than any other stand, of course.

Q. Isn't it true?

Mr. English: I don't think the Mayor testified to that, your Honor. I don't want counsel to misquote the testimony.

Q. Isn't it true that—

Mr. English: Wait a minute.

The Court: I can't recall whether the Mayor did or whether he didn't say it. Isn't it immaterial?

Mr. English: As a statement of fact it is immaterial, if it is a fact—

The Court: This witness will tell us whether there were twenty or twenty-five at the station.

Mr. English: I have no objection to that whatever.

The Court: It is true there were, isn't it?

The Witness: At times perhaps in the evening there would be as many as twenty; I am not sure because I didn't count them.

CROSS EXAMINATION BY MR. ENGLISH:

Q. Were the whole forty down there at any one time? A. I have never seen them.

Q. Never seen more than twenty down there? A. I don't think I have, as I know of.

Q. Some of the cabs that do business at the station park out on Morris Street.

Q. Some park out on Morris Street and some in front of Smith's drugstore; there are three public hack stands.

Q. That cross the tracks from the station, we are talking about. A. Yes, sir.

Q. Out in the public street? A. Yes, sir.

Q. Just about Saw Mill Lane for a minute. When you first knew Saw Mill Lane were there houses up there where people lived? A. Three families lived back of the beef house.

Q. How long ago did those dwelling houses move? A. I don't remember that part because after it was built up there those houses were town down; the property was brought and put in the Erie Railroad, and those things; I don't just—

Q. Used for business purposes now chiefly? A. Yes.

Q. Have you seen traffic coming in and out of Saw Mill Lane and going into Morris Street? A. See it every day when I am down there.

Q. Does it go under the tracks of the freight house? A. Good deal of it goes under the track by the freight house. We on the hack stand naturally can see it, and sometimes we get a fare from the Erie station and they—

Q. Do you see the traffic from Saw Mill Lane go down to Lackawanna Place to go to Morris Street that way? A. Sometimes see walking, sometimes driving, just where the people live, I guess he goes the nearest way to his home, I suppose.

Mr. Bolitho: All our other witnesses, the defendant hackmen, would testify in substance the same as the witnesses have already testified. I think counsel will agree that shall be understood in the case.

Mr. Stallman: What is that?

Mr. Bolitho: That all the other taxicab men would testify to the same thing.

Mr. Stallman: I was willing to agree to all those you had in the court room but I don't understand my statement goes any further than that.

Mr. Bolitho: We have, I think, one other in the court room now, Mr. Powers. Will you stipulate he would testify the same as the others?

Mr. Stallman: I don't know. He has not heard what these other men have said.

Mr. Bolitho: I mean those who have been sworn.

Mr. Stallman: Those in the court room I will admit.

Mr. Bolitho: We are talking about Mr. Powers, who is in the court room.

Mr. Stallman: Oh, yes, anybody who is in the court room.

Mr. Bolitho: If your Honor please, I desire to offer now on the part of the defendant taxi men the remaining portion of the affidavits which counsel for the complainant introduced yesterday, the answering affidavits, in the record on the application for preliminary injunction.

Mr. Stallman: We object to the offer on the ground affidavits made on behalf of the party are not competent. I think I have gone about as far as I ought to in conceding if the other taxicab drivers in the court room were put on the stand they would testify the same as those who have already testified.

The Court: Yes; I don't think you can put the affidavits in evidence. The affidavits are part of the record in the case, not part of the testimony but they are part of the physical record.

Mr. Bolitho: The main reason I am offering them is because yesterday Mr. Stallman offered a portion of these affidavits.

The Court: I don't think he did. I think he indicated to the Court certain things which he said were declarations against interest, and called attention of the Court to those alleged declarations against interest as contained in the record of the proceedings. I think he has a right to do that.

Mr. Stallman: Just the same as if they were in the pleadings.

Mr. Bolitho: I pray an exception.

The Court: Yes.

Exception noted.

Mr. English: I would like to ask counsel if they will admit as a matter of fact the Town of Morristown paid the Lackawanna Railroad $16,420.17 in connection with the—

Mr. Stallman: I will not admit—

Mr. English: As a matter of fact?

Mr. Stallman: As a matter of fact I don't know anything about it. I think the Town may have paid that out to the contractors.

Mr. English: No, paid the Lackawanna Railroad.

The reason I ask for it is the contract provides for mutual things by the two contracting parties; the Town to do certain things and the Railroad to do certain things, and it was stipulated the acts and things to be

done and performed by each is an essential consideration of the acts and things to be done and performed by the other party. I don't want it to appear the vacation of street was a pure gratuity on the part of the Railroad, because the fact was the town itself spent a lot of money in connection with this improvement.

Mr. Stallman: The contract will speak for itself.

Mr. English: I know, but it doesn't say how much money was spent under it. It required the thing to be done under it. I am proving what was done by the Town under the contract.

The Court: I don't see how it is material.

Mr. English: May I make an offer of proof?

The Court: Yes.

NATHANIEL C. TOMS recalled.

DIRECT EXAMINATION BY MR. ENGLISH:

Q. Mr. Toms, as Town Clerk have you custody of the records showing what moneys, if any, were spent by the Town of Morristown under the contract, so-called elevation contract of September 24, 1912, which is in evidence in this case? A. They are in my joint custody with the Treasurer.

Q. They are part of the records of the Town? A. The actual vouchers showing the payment.

Q. Yes. Do you know how much money, don't give the amount on this question; do you know how much money the Town of Morristown paid to

the Lackawanna Railroad in connection with the performance of the elevation contract?

The Court: That calls for a yes or no answer.

Q. Do you know; yes or no? A. I can't testify as to the exact amount of money which was paid. This is a bill submitted by the Lackawanna Railroad Company.

Q. Do you know whether the bill was paid? A. It was paid; yes.

Q. All right. Then, refreshing your recollection from the papers in your hand; don't give the amount on this answer; can you say what the amount was? A. Yes.

Q. All right. Now don't answer this until the Court rules. How much did the Town of Morristown pay the Lackawanna Railroad in connection with the work done and to be done under the elevation contract in evidence in this case?

Mr. Stallman: We object on the ground that the town—

The Court: Is there any doubt but what this contract was performed between these parties?

Mr. Stallman: Not in the least.

Mr. English: I never heard of any doubt.

The Court: Then it strikes me it is immaterial, the nature of the performance on either side. The fact remains it was performed.

Mr. Stallman: Yes.

The Court: And their rights are fixed by the terms of the contract.

Mr. English: All right.

Mr. Stallman: I just want to say this—

The Court: I will rule that out and allow an exception.

Mr. English: Yes.

Exception noted.

Exception allowed.

Mr. Stallman: I want the Court to get an idea of what is endeavored to be injected into this case. This contract provided the Railroad Company should elevate the tracks, build a new station, do a lot of work underneath; the town was going to change the grade of some streets at the time the contract was signed; they found out the Town didn't have the men or equipment to do the work and they agreed to do it, so we made this contract read the Railroad Company would do the town's work and—

Mr. English: I think it is proper—

Mr. Stallman: Wait until I get through.

And the Railroad Company would do the work which the Town had agreed to do if the Town would pay the Railroad Company the same as they would pay the other contractor, and now the effort is being made to throw some atmosphere into this case that the Town has purchased about $16,000 worth of equity in the Railroad Company's property. There is nothing to it.

Mr. English: I am trying to prove the Town did what it agreed to do, but now you have admitted the contract was performed.

Mr. Stallman: I always insisted it was performed. There is the provision about $16,000.

Q. Mr. Toms, while you are on the stand; you are familiar with the map which is annexed to the —

Mr. English: I don't remember saying that. In my own mind I rested the case, although I don't think I announced it to the Court, but I have thought of these things since.

The Court: I think you are right you have not said that you rested.

Q. While you are on the stand; you are familiar with the map annexed to the elevation contract in evidence, are you not? A. Yes.

Q. The elevation contract in evidence, under the caption "New Street", refers to a driveway to be laid out. Can you just in general terms describe where that driveway runs so that we will have on the record where it runs?

Mr. Stallman: We object to any oral testimony. The contract will have to be construed according to what it is, and not this witness' understanding.

Q. Will you just come down here and indicate on the map where that driveway which is referred to in the part of the contract I called your attention to is?

Mr. Stallman: I object to testimony on the part of the witness, that is a construction of the contract.

Mr. English: No, it is not; I beg your pardon.

The Court: Where is the provision of the contract wou are referring to?

Mr. English: "The Railroad Company shall lay out and locate and construct a new driveway and station grounds approach extending

northerly at right angles from Morris Street, between the Railroad Companies' proposed new passenger station grounds and the Railroad Companies' present freight house tracks, to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly and southerly lines of the lands of the Railroad Companies, as shown in white shading upon the annexed map. Said driveway shall be forty-eight (48) feet in width. Where said drive way shall intersect the Railroad—"

I want him to point out on the map where it is.

The Court: Where is the white shading?

Mr. English: On this particular map it is green.

The Court: Is that true, Mr. Stallman, it is green on this map where on the map with the contract it is called white shading?

The Witness: This is not the map.

Mr. Stallman: Oh it is not. Get the right map then.

The Court: Well, now, gentlemen, I think I will sustain the objection to the question. The white shading is either shown on the map or it isn't, and if it is shown on the map there cannot be testimony as to it, and if on the map actually produced it appears to be in green and I am not going to waste time trying to find out whether it is green or white.

Mr. English: Counsel ought to produce the right map.

The Court: Yes; counsel ought to object if the wrong map is introduced when the contract was put in evidence.

Nathaniel C. Toms. Recalled. Direct.

Mr. Stallman: This is the contract that is on file.

The Court: All right; the objection is sustained.

Mr. Stallman: I am willing to admit this for the sake of the record, that the driveway which is mentioned in the contract as being forty-eight feet in width does run from Morris Street for a width of forty-eight feet until it strikes the railroad, and then it crosses the railroad through an opening forty-eight feet in width and after that the plaza is a triangular piece of land.

Mr. English: I won't take this admission because it is not fact.

The Court: I am going to take it as shown on the map.

Mr. English: I stand by the map.

The Court: So do I.

Mr. English: What he is saying is not according to the map.

The Court: All right; I don't think we need even the description by counsel.

Mr. English: Very good.

The Court: What is shown on the map in green is what is referred to in the contract as being shaded white.

Mr. English: That is my information.

The Court: Is that right, Mr. Stallman?

Mr. Stallman: I think that is right.

The Court: If it is not right, correct it by the surveyors.

Mr. Stallman: I think that is right.

The Court: Now, Mr. English, are you through?

Mr. English: Will you let me do one thing more?

Q. Mr. Toms, have you produced from the records of the Town Clerk the original map submitted to the Town at the exception of the elevation contract? A. I have it here.

Q. Is this it (indicating)? A. It is.

Mr. English: I offer it in evidence.

The Court: All right. If it is the same map as that offered by Mr. Stallman why offer it?

The Witness: The other map has been changed.

Mr. English: Except this is the original, and the other is not quite like it.

Mr. Stallman: I would like to ask Mr. Toms, is there a map that is annexed to your copy of the contract?

The Witness: That is the map that came with the contract. The map you had Mr. Stallman, has been changed, has been added to since.

Mr. Stallman: Will you answer this question: Is there a map annexed to your contract?

The Witness: There was no map annexed to the contract, Mr. Stallman. This map accompanies the contract.

Mr. Stallman: Haven't you a map which was identified by the signatures of the Mayor and the Chief Engineer of the Delaware, Lackawanna & Western Railroad Company? I call attention to the contract, which says, "Annexed hereto are maps, plans and files properly attested by the Mayor of the Town of Morristown, on behalf of the Town of Morristown, and by the Chief Engineer of the Railroad Company on behalf of the Railroad Company."

Nathaniel C. Toms. Recalled. Direct.

I object to the offer on the ground that the contract identifies the map by certain markings and the map offered does not have that marking.

The Court: The objection is sustained.

Mr. English: I pray an exception, your Honor.

Exception noted.

Exception allowed.

The Court: Now, gentlemen, we need not wrangle over this map. If it was identified, or either copy was in that way I suppose a blueprint may be made of it and sent to me as part of the record in this case.

Mr. English: That is right. I would like to make a motion that I would like counsel to produce the map he produced and offered in evidence yesterday as the map annexed to the elevation contract.

Mr. Stallman: I am producing what you asked us to produce.

Mr. English: Are they signed as required by the terms of the contract? Can you tell us? (after examination) On inspection I see they are not signed.

I move to strike out all the maps which the complainant offered in evidence annexed to the contract.

The Court: We come right down to my ruling, which was that the blueprints of the designated map shall be sent to me as an exhibit in the case.

Mr. English: That is all right. I am objecting to an exhibit being in evidence as purporting to be a map authenticated under the con-

tract. I move his maps be stricken out on the ground they are not authenticated as required by the contract.

Mr. Stallman: I didn't offer them.

The Court: Are they marked anywhere?

Mr. English: I object to their being part of the record in this case if my map goes out.

The Court: I don't see any court marking on this paper that is handed to me.

Mr. English: Then your Honor rules that out as part of the record in the case?

The Court: I don't see physically how they are.

Mr. English: If your Honor so rules, that is satisfactory to me.

The Court: If you don't want them you may hand them back to Mr. Stallman.

Mr. English: I don't want them. They were not put in by me.

Then your Honor does not grant my motion because it is not necessary, they not being of record in the case?

The Court: I can't grant a motion when there is apparently nothing before me that is a record in the case.

Mr. English: Then they are out. I guess we are through.

Mr. Stallman: I would like to ask if counsel will agree with me that the map on the easel indicates substantially what is on the ground, that is that on the shelter house side of the station there is a large triangular piece of land in the center of which is a flower bed, and that the driveway on that side completely surrounds the flower bed?

Mr. English: The map you are referring to is marked C-24 for identification, and my clients tell me that is not an accurate map, and I don't concede it.

Mr. Stallman: Mr. Tom's, will you take the stand for me?

Mr. English: What is this for, rebuttal?

Mr. Stallman: Yes, just half a minute of rebuttal.

REBUTTAL.

NATHANIEL C. TOMS, called on behalf of the complainant, being previously sworn, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Does the map on the easel substantially locate the driveways on the right hand or shelter house side of the Morristown station?

Mr. English: I object to that as not rebuttal.

The Court: The objection is well taken.

Do you reopen your case?

Mr. Stallman: Yes, if I may I would like to.

The Court: Yes, sir.

Now, the same question being asked you, how do you answer?

FOR THE COMPLAINANT:

Q. About the driveways? A. I would say the map on the easel is incorrect in a very important

part of it, and different from the conditions on the ground inasmuch as it blocks off the end of Saw Mill Lane and makes it appear Saw Mill Lane comes down, goes up and comes down again in Lackawanna Place, whereas, as a matter of fact, there is no blocking off there and Saw Mill Lane comes right down straight into that driveway. Whether that is blocked off of the yellow line to delineate the present fee holdings of the Lackawanna or—

Q. Well, Mr. Toms, does the map show the location of the flower bed on the right hand side of the station grounds? A. Mr. Stallman, I am not a commuter; I don't know where those flower beds are except substantially.

Q. All right. A. My business is right up on the park.

Mr. Stallman: All right, then I will excuse you. I thought probably in the testimony you gave about being familiar down there for so many years you would know.

Mr. English: He didn't give that testimony.

The Court: Mr. Stallman, if you want to make proof of your maps or anything of that sort I will hold this case open until a week from next Monday at Newark, at which time you may make proof of say ten or fifteen of your maps.

Mr. Stallman: In view of the fact that both sides have so frequently referred to the map attached to the bill of complaint, both sides having used it and having examined and cross examined witnesses with reference to that map, I will close the case and leave the small map before the Court, because it is really large

enough to show the outlines of the Railroad Company's property and the location of the lands on the right hand side. I think the flower bed is really marked on that small map and the whole extent of the Railroad Company's property is there, so it will not be necessary for me to make any further proof on the map.

(It was agreed that the case be argued on Monday, December 22d, at two P. M.)

Monday, December 22, 1924.

Case resumed pursuant to adjournment.

APPEARANCES AS BEFORE.

Mr. English: I would like to make a motion before we go to the argument.

Your Honor will remember I said at the conclusion I had a motion to make. The motion is the same as I made before, but there are now new facts upon which to argue, namely that the bill is defective for lack of parties, first, with respect to the Morris & Essex Railroad Company, which I think is a proper party.

Until the case went to trial we did not have before us the lease, which is the basis of the claim of the claimant Railroad Company, that it alone is a necessary part with respect to the possession of these lands. The lease is now in evidence and it provides, among other things, as follows: in Article 3 of the lease it says "and whenever this lease shall be terminated, they shall deliver to the party of the first part,"

that is the claimant here, the Lackawanna is the "they" referred to, the Lackawanna "shall deliver to the party of the first part, the peaceable possession of all the real property and railroads hereby demised, and that may be constructed in pursuance of this indenture, also all other property which may hereafter be acquired by the party of the second part, with the bonds, obligations or stock issued as aforesaid by the said party of the first part; all of which shall be delivered in at least as good order and condition as the same now is;" so there is, in the first place, a clause there that when this lease is terminated, whenever that shall be, everything which the claimant Lackawanna leased from the Morris & Essex goes back to it. That, of course, includes the Lackawanna—

The Court: When does the lease terminate?

Mr. English: With respect to that the term of the lease is the corporate existence of the Morris & Essex, but there are default clauses in it which I think may alter the situation. Article 4, "In case the said party of the second part shall at any time refuse or neglect, for the period of six months, to make any of the payments by them in this indenture agreed to be made, then and in that case the said party of the first part may, at their option, at any time within ninety days thereafter, but not afterwards for that default, treat this lease as at an end, and at once resume and take and hold full possession and control of all the property—".

The Court: On the preliminary motion didn't the authorities show that an action in trespass at law could be maintained by the tenant in possession?

Mr. English: Yes, sir, but this is not an action in trespass, this is an application for injunction.

The Court: To restrain a continuing trespass.

Mr. English: On the theory of restraining a continuing trespass, yes, sir; I don't think it could be characterized an action in trespass.

The Court: I don't either.

Mr. English: The point I make now is there is no guarantee, there may be a presumption but there is no guarantee there never will be a default in this lease, and when the default does take place this property, if the default takes place before the end of the corporate existence of the Morris and Essex goes back into the Morris and Essex Company's control and possession again, and therefore, that being the situation it is certainly a proper party, and I think it is a necessary party to a proceeding which involves a perpetual injunction sought to be obtained on the theory there is a continuing trespass on this land which will go on forever.

The Court: I suppose what the Morris & Essex Railroad would do if the Lackawanna seized this property would be to have it indicated upon the record that it was then the owner in possession of the property which the Lackawanna had received and an injunction restraining a trespass could be substituted. Then I suppose if the city holder file an injunction, if an injunction should issue an application could be made for a rule to punish the city or town for contempt.

Mr. English: I can't undertake to say what would happen in the future. All I can say is, it seems to me, under the language of the lease

that this provision for default, which is a legal possibility, if not an economic probability, the Morris & Essex is a proper party. That is one motion.

The Court: I think the tenant in possession may very well complain of a trespass, and I think since it can complain of a single trespass if the trespass is repeated it can invoke the aid of equity to restrain.

Mr. English: I am only saying the additional party to the suit ought to be not only the tenant in possession, which is for the time being the Lackawanna, but also, in view of the language of the lease, the owner.

The Court: If the owner were continually trespassing the Court would restrain the owner at the suit of the tenant.

Mr. English: I presume that is true.

The Court: Therefore it seems to me the owner is an unnecessary party complainant.

Mr. English: The other motion is with respect to LaClare L. Welsh, whom I also claim should be a party complainant. We now have before us in evidence the lease between him and the Lackawanna Railroad—

The Court: Contract.

Mr. English: —from which two things appear.

The Court: Contract.

Mr. English: Beg pardon; contract, from which two things appear. One is that the Railroad and he share the proceedings of the arrangement, so that he has a financial stake in the arrangement between him and the Railroad. The other is that he has an exclusive

parking privilege, which I think gives him an interest in the land.

The contract by paragraph 1, subdivision 3, says this: "The railroad does hereby grant to Welsh during the terms of this agreement (3) The exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blue-print map hereto attached."

Your Honor knows one of the spaces shown in green is the cabstand along the easterly side of the elevation wall on this driveway which is in question in this suit, so that I think the point must have escaped your Honor, it did my attention, when I made a motion at the time of the preliminary injunction, and it must also have escaped your Honor's attention because in the opinion you wrote the motion was denied, there being nothing to show the taxicab owner had any possessive right in the lands.

Now that my attention has been called to this, and call it to your Honor's attention, I think I was derelict in not calling it to your Honor's attention before because it seems to me the language, "exclusive privilege of parking vehicles employed in the cab service," does give him a possessive right to the lands in question to that extent. We can't claim a fee. Whether he would have rights of ejectment against somebody else I don't know, but he has some rights in that land, namely, an exclusive parking privilege to put his cabs there and see to it nobody else does.

The Court: I would say he had a right to go upon the land but no right in the land.

Mr. Stallman: Licensee.

The Court: Exactly. I may have been inartistic in the use of my language, but I still think he has no possessive rights because he is a mere licensee.

Mr. English: I don't know about that. He has a contract here that is good for some ten years, I think.

The Court: I think he is in the same position I am with respect to this court room. So long as I am a Judge I have the privilege of holding court in this room. I assume that is a license, but I don't think it gives me any possessive rights in the Government's property.

Mr. English: Suppose some individual like us had the temerity to come to the bench and say we are going to hold court. Couldn't the Court eject us?

The Court: I presume so. I think I could restrain you from doing that.

Mr. English: I think likely you could. I think, sir—

The Court: I further might say you as a member of the Bar of this court have the license to come to this room, go to the Clerk's office, go to the Marshal's office in the transaction of your business.

Mr. English: That is a life privilege unless it is revoked for cause.

The Court: Exactly. It is rather a better tenure than Welsh's right to go upon the Lackawanna station grounds.

Mr. English: While it lasts under his contract it is an exclusive parking privilege which, in spite of the analogies which your Honor

suggests, seems to me gives him some kind of a right in that land.

For those reasons, one because of the language of the lease with respect to the Morris & Essex, and the other because under the contract with respect to Welsh, I submit they are necessary parties, and the bill is defective for lack of them, and the complainant having elected to ignore that situation the bill ought to be dismissed, and I so move.

The Court: The motion will be denied.

Mr. English: I pray an exception.

The Court: Yes.

Exception noted.

Exception allowed.

Exhibit C-15.

AGREEMENT, Made this twenty-fourth day of September, Nineteen Hundred and Twelve;

Between THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, NEW JERSEY, a municipal corporation of the State of New Jersey, party of the first part, hereinafter called the "Town" and THE MORRIS AND ESSEX RAILROAD COMPANY, a corporation of the State of New Jersey, Owner, and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation of the State of Pennsylvania, its lessee, parties of the second part, hereinafter called the "Railroad Companies."

WHEREAS, the railroad of the Railroad Companies extends through the Town of Morristown, Morris County, New Jersey, and crosses Ford Avenue and Morris Street in said Town at the grade thereof, and has been so located, constructed and operated for many years past, and

WHEREAS, for the purpose of securing greater safety to persons and property, and to facilitate the construction and maintenance of other than grade crossings in said Town, the parties hereto desire to have the main tracks of said railroad relocated and elevated, so as to cross said Ford Avenue and Morris Street over and above the same, and

WHEREAS, to relocate and elevate said railroad and to change the grade of said Ford Avenue and Morris Street to effectuate the purposes aforesaid is practicable and would, in the judgment of the Mayor and Board of Aldermen of said Town be best adapted to secure the safety of lives and property,

and provide for other than grade crossings of the streets in said Town, and promote the interest of said Town, and

WHEREAS, the following statutes of the State of New Jersey, namely, an act approved April 14, 1903, being Chapter 257 of the sessions laws of that year, and an act approved March 20, 1901, being Chapter 63 of the session laws of that year, and an act approved March 30, 1904, being Chapter 209 of the session laws of that year, have authorized such contracts as shall be made in pursuance thereof, and

WHEREAS, The Mayor and Board of Aldermen of the Town of Morristown, has, by its ordinance passed the fourth day of October, 1912, authorized the making and entering into of this agreement;

NOW THIS AGREEMENT WITNESSETH, that pursuant to said statutes and other statutes of the State of New Jersey, and in consideration of the premises, and of the covenants, terms and conditions herein after set forth to be severally kept and performed by the parties thereto, it is agreed between the parties hereto as follows:

I.

LOCATION AND GRADE OF TRACKS.

The main tracks of the Railroad Companies shall be relocated and elevated as shown upon the attached map and profile, by and at the expense of the Railroad Companies, crossing over and above the grade of Ford Avenue and Morris Street to be established as hereinafter provided. The Railroad Companies' main tracks shall be carried across said

streets and a new driveway west of station upon suitable steel girder bridges erected upon concrete masonry abutments, placed as shown on annexed plans. Said bridges shall have water-tight floors, which shall be so maintained; the bridge floors on the structures over the two streets, the driveway and the subway shall be made with a concrete base encasing the steelwork of the bridge floor, and the concrete shall be waterproofed on its upper surface, and the waterproofing protected; ballast being placed between the bottom of the ties and top of the protected waterproofing, making water-tight floors over the sidewalks and driveways; said bridges shall be so constructed to provide a minimum clearance at the intersection of the railroad center line and the center line of the said streets as follows:

Clearance of centre of street	Elevation underside of bridge (Town datum)	Elevation underside of bridge (Railroad datum)	Elevation of street when depressed (Town datum)	Elevation of street when depressed (Railroad datum)
Ford Ave. 12.5		340.16		327.66
Morris St. 13.0		335.86		322.86

Where necessary, the Railroad Companies may place columns upon the curb lines of said streets for the support of said bridges.

II.

Maps and Plans.

Annexed hereto are maps, plans and profiles properly attested by the Mayor of the Town of Morristown, on behalf of the Town, and by the

Chief Engineer of the Railroad Companies on behalf of the Railroad Companies, showing the location of the tracks and lines of the Railroad, bridges and structures, and profile showing elevation and grade of the tracks and streets and the various structures to be erected, also floor plans and elevations of the station to be erected in accordance with the terms of this agreement. Said maps, plans and profiles are as follows:

(1) Map showing the general location of tracks and streets, relocated tracks, new street, driveways and depot, entitled D. L. & W. R. R.—Morris and Essex Railroad—Map of Station Grounds and Yards—Ford Avenue to Emmet Avenue, Morristown, Morris County, New Jersey, dated the twenty-second day of July, 1908.

(2) Profile showing grade and elevations to be established for the tracks and streets, entitled, D. L. & W. R. R.—Profile of Morristown Track Elevation, Morristown, New Jersey, dated the fourteenth day of May, 1912.

(3) Profile of temporary and permanent grades to be established upon and along Morris Street, entitled, D. L. & W. R. R.—M. & E. Div., Morristown, N. J., Sketch showing proposed temporary grade to be used during the erection of the steel girder bridge over Morris Street, dated the twenty-second day of May, 1912.

(4) General details of new station location, layout and approaches, entitled, Station Grounds for Morristown, dated the sixteenth day of March, 1911.

(5) Details of plans, Elevation and sections of new passenger station, respectively entitled:

(5) Proposed Passenger Station at Morristown, New Jersey, Track Level Floor Plan, Dated the seventeenth day of March, 1911.

(6) Proposed Passenger Station at Morristown, New Jersey, Transverse Section, dated the seventeenth day of March, 1911.

(7) Proposed Passenger Station at Morristown, New Jersey, Morris Street Elevation, dated the seventeenth day of March, 1911.

(8) Street Profile, dated the twenty-second day of May, 1912.

(9) Plan entitled proposed construction at the expense of the Town of Morristown, dated the twenty-second day of May, 1912.

Each and all of said maps, plans and profiles are hereby declared to be made a part of this agreement.

As it may be found necessary by both parties hereto, during the progress of said work, to make changes in plans or parts of plans, or in the construction of said work, it is hereby agreed that when such changes are agreed upon by the parties hereto, and approved by resolution of the Mayor and Board of Aldermen of the Town of Morristown, the work shall proceed in accordance therewith. A copy of such resolution shall be made a part of this agreement, and a certified copy thereof shall be furnished to the Railroad Companies.

III.

Closing of Streets and Temporary Work.

As it will be found necessary during the progress of the work to temporarily obstruct streets, permission is hereby given by the Town to the Railroad Companies to temporarily obstruct and use during the progress of the work herein mentioned both Ford Avenue and Morris Street, but both of said streets shall not be closed and obstructed at the same time, that is to say: Ford Avenue shall not be closed and obstructed while Morris Street is closed to public travel, and Morris Street shall not be closed and obstructed while Ford Avenue is closed to public travel. The Railroad Companies shall, at their own expense, remove such obstructions and restore said streets to public travel as expeditiously as the progress of the work will permit.

For the purpose of facilitating the work of construction and reconstruction to be performed by the Railroad Companies, and to prevent interruption to their traffic during the progress of said work, the Railroad Companies are hereby given the right to construct and maintain during such time as may be required, an additional temporary track or tracks across Ford Avenue, Elm Street and Morris Street crossed by the Railroad Companies' railroad in said Town and at the grade thereof; but such temporary track or tracks shall be so constructed, maintained and operated as not to impede the public travel on said streets, except where a street is to be temporarily closed; provided, however, that a safe passage for persons on foot desiring to cross the tracks on Morris Street shall at all times be maintained with proper safeguards, and provided such additional temporary work or tracks

shall be removed as soon as the said work shall permit, which shall be not later than six weeks after the finishing of the work at the particular point or points affected.

As the Railroad Companies may be unable to properly maintain their telegraph lines upon their right of way during the period of reconstruction of their tracks, the right is hereby given the Railroad Companies, so far as the Town is able to give such rights to temporarily construct and maintain the same along convenient streets during the progress of the work; provided, however, that in the exercise of such right there shall be no interference with the rights in such streets of any other person or persons, corporation or corporations, to whom privileges or rights have heretofore been granted, the Railroad Companies hereby agreeing to restore such streets to their original condition and to replace such telegraph lines upon their right of way as soon as the said work shall permit.

The Railroad Companies shall have the right to erect false work upon Ford Avenue and Morris Street for the construction of the railroad bridges over the same, which false work shall be removed as soon as the bridges are completed.

The Town shall take all official and other action possible to accomplish these purposes.

IV.

Changes in Grade Streets.

Ford Avenue, where the same crosses the right of way of the Railroad Companies shall be depressed not to exceed six (6) feet three (3) inches. Morris Street, where the same crosses the right of way of the Railroad Companies shall be depressed

not to exceed five (5) feet. Elm Street shall be depressed from its intersection with Morris Street southwesterly for a distance of about one hundred and fifty-eight (158.0″) feet to conform to the new grade of Morris Street. Blatchley Place shall be depressed on its easterly side only at its two ends to conform to the adjacent depression of Morris Street and Elm Street respectively.

V.

VACATION OF STREETS.

The Town shall vacate Saw Mill Lane from its intersection with Morris Street to the northerly terminus, or so much thereof between said points as now exists as a public street or highway of said Town.

VI.

NEW STREET.

The Town shall lay out and construct a new street running upon and along the northeasterly side of the Railroad Companies' retaining wall from Morris Street north for a distance of approximately three hundred and fifty (350) feet, having a width of forty-eight (48) feet as shown in yellow shading on the map herein attached, to connect with the station grounds in the rear of the Railroad Companies' shelter house.

The Railroad Companies shall dedicate any lands owned by them necessary for the laying out of such new street as above mentioned, and the Town shall, at its own expense, acquire all lands other than the lands to be dedicated by the Railroad Companies,

which shall be necessary for the laying out and establishment of such new street.

The Railroad Companies shall also lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from Morris Street, between the Railroad Companies' proposed new passenger station grounds and the Railroad Companies' present freight house tracks, to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly and southerly lines of the lands of the Railroad Companies, as shown in white shading upon the annexed map. Said driveway shall be forty-eight (48) feet in width. Where said driveway shall intersect the Railroad Companies' relocated main tracks, the Railroad Companies shall construct a passageway beneath their said tracks with a width of forty-eight (48) feet, and said forty-eight foot roadway and passageway shall have a sidewalk eight (8) feet wide as shown on the map annexed hereto. The height of said passageway shall be twelve (12) feet six (6) inches, and the Railroad Companies shall carry said tracks over and across said passageway on steel girders resting upon masonry abutments. The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway.

VII.

Passenger Station.

The Railroad Companies shall erect a new Passenger Station north of Morris Street, as shown upon the annexed plans, with a shelter house on the easterly side of the tracks, which shelter house shall be connected with the main station by a subway twelve (12) feet in width. Said shelter house to have a waiting room forty (40) feet in length and sixteen (16) feet in width, as shown on attached plan.

It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.

VIII.

Division of Cost.

All expense of filling for the elevation of the tracks and of the erection and maintenance of the retaining walls and other masonry, stations, bridges and structures to be erected or constructed by the Railroad Companies are herein provided, and for lands and right of way of the Railroad Companies' structures shall be borne and paid for by the Railroad Companies.

The Railroad Companies shall, at their own expense, maintain their railroad bridges and supports thereof on Ford Avenue and Morris Street and the driveway to cross under tracks west of depot,

and the Town shall do all the work and assume the expense of drainage, reconstruction and maintenance of the streets beneath such bridges, except the cost of storm water sewer in Morris Street, as hereinafter stated.

The Town shall, at its own expense, under usual proceedings provided by statute, acquire or cause to be acquired, all lands necessary for the establishment and location of the new street herein mentioned, outside of the lands owned and to be dedicated by the Railroad Companies as herein provided. The Town shall also, at its own expense, under usual proceedings provided by statute, do all the work of grading and regrading, paving and repaving, construction and reconstruction of all the streets and highways herein provided to be opened, located and constructed, and depressed, or otherwise altered, and of other streets intersecting and affected by said changes, including the proper drainage thereof, and shall also, at its own expense, make or cause to be made, all necessary provision for and change the location of all sewers, gas mains, water pipes, and other sub-surface conduits and structures, which shall be necessary for the proper completion of the provisions and purposes of this agreement.

The Town shall pay all damages resulting from the laying out, vacation, or alteration of the grades of streets pursuant to this agreement and all expenses and costs of litigation or legal proceedings in connection therewith, but shall not be held liable for damages resulting from the actual elevation of the tracks.

Upon the attached plans is shown in dotted red lines a proposed storm water sewer, its approaches and catch-basins, the construction cost of which

shall be divided equally between the Town and the Railroad Companies, but said storm water sewer shall be maintained by and at the expense of the Town.

It is further understood and agreed that the Railroad Companies shall not be required to assume or participate in any expense or pay any sums of money whatever, or do any work whatever, or contribute any lands or property, in connection with any of the work, matters or things in this agreement mentioned or referred to or shown upon the annexed plans, except the expenses, moneys, work, lands and property which in this agreement are specifically provided to be borne, paid, done, performed or contributed by said Railroad Companies unless the same shall be hereafter otherwise agreed to by a supplemental agreement duly executed.

IX.

Miscellaneous.

The Railroad Companies' rights and privileges, and the lawful use and operation of their property and franchises shall not be limited or modified other than as specifically set forth herein.

The Town shall take all official action necessary to facilitate the work herein provided for, at such time as the Railroad Companies may request, and as may be necessary for the proper prosecution of the work. The Town shall adopt and pass such ordinances or resolutions as shall be necessary to cause the necessary changes to be made in all electric light, telephone, telegraph and other wire lines and appurtenances thereof, and all other surface or over-head structures or transmission lines

in such manner and at such times as to not interfere with the work covered by this agreement.

The work to be performed by the Town as provided herein shall be performed and completed by the Town as promptly as the reconstruction work by the Railroad Companies will permit or make necessary.

As the Railroad Companies may be able to use for the construction of their embankment, a part of the material excavated for the depression of Ford Avenue and Morris Street and Elm Street, it is agreed that the Railroad Companies shall pay to the Town twenty-five (25) cents per cubic yard for all such material which they can use for such purposes, provided the same is delivered upon such embankment without additional expense to the Railroad Companies.

The work of track elevation and other changes to be made by the Railroad Companies as provided in this agreement shall begin not later than ninety (90) days after the first day of January, 1913, and shall be pressed forward vigorously to completion.

The Railroad Companies will do, or cause to be done, all or any part of the work in this agreement provided to be done by and at the expense of the Town (except the purchase of lands for street purposes), the total cost of which is estimated to be $17,034.66, as per estimate attached hereto; and the Town shall pay the Railroad Companies the actual cost of all such work, at the unit prices named in the said estimate; payment therefore to be made as follows: $5,000.00 with interest at 4 per cent. on the total costs, at the end of one year from date of this agreement; $5,000.00 with interest at 4 per cent. on said total cost less $5,000.00 at the end of two years from date hereof; $5,000.00 with interest at 4 percent. on the total sum less $10,000.00 at the

expiration of three years from the date hereof and the balance, with interest at 4 per cent., at the expiration of four years from the date hereof.

If any legislation shall prove to be or be deemed necessary in order to carry out this contract or any of its provisions, each party hereto shall join the others in earnest efforts to obtain such legislation as promptly as possible.

It is further stipulated and agreed that the present building occupied by the First Ward Hose Company may be moved back and left on the lot on which it is situated, but nothing herein contained is to be construed as being a lease to the Town of said building or the lot whereon the same is located.

It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for, and in case either party to this contract shall refuse, neglect or omit to do any act, or take any proceedings herein required to be done or taken by such parties, or which shall be necessary to be done in order to accomplish the objects contemplated by this agreement, proper action may be taken in the proper court by the other party hereto to compel specific performance of any such acts or proceedings, or to restrain any violation of the terms thereof, in addition to the right to enforce any legal claim for damages on account of such refusal, neglect or omissions.

IN WITNESS WHEREOF, the party of the first part has by authority of an ordinance of its Mayor and Board of Aldermen caused this agreement to be ex-

ecuted on its behalf by the signature of the Mayor of the Town of Morristown and the corporate seal of said Town to be hereunto affixed, attested by the Clerk of said Town; and the parties of the second part have each caused this agreement to be signed by their respective Presidents and their respective corporate seals to be affixed hereunto, attested by their respective secretaries, the day and year first above written.

THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, NEW JERSEY,
By ARTHUR S. PIERSON,
Mayor.

(Seal)

Attest:
NATHANIEL C. TOMS,
Town Clerk.

THE MORRIS & ESSEX RAILROAD COMPANY,
By W. H. TRUESDALE,
President.

(Seal)

Attest:
A. D. CHAMBERS,
Secretary.

Exhibit C-17.

TO WHOM IT MAY CONCERN.

YOU ARE HEREBY NOTIFIED that The Delaware, Lackawanna and Western Railroad Company has entered into a contract with Laclare L. Welsh of Morristown, New Jersey, wherein said Laclare L. Welsh has agreed to furnish and provide at the Morristown passenger station of said Railroad Company adequate and efficient cab service for its patrons for the transportation of such patrons to and from its said station and also for the transportation of their baggage and that the said Railroad Company has in said contract granted to the said Laclare L. Welsh the exclusive right to solicit business as a cabman in the said station and on said station grounds of the Railroad Company, the exclusive right to maintain a cab stand in said station, and the exclusive right to stand or park cabs used in said service on said stations grounds.

AND YOU ARE HEREBY FURTHER NOTIFIED AND DIRECTED to refrain from soliciting the custom or patronage of such passengers or other patrons or the custom or patronage of any other persons on the premises of said Railroad Company and from entering or remaining upon said premises for the purpose of soliciting such custom or patronage and from standing or parking cabs or other vehicles on said premises in pursuit of such purpose.

The station grounds and premises of the Railroad Company include not only the station house and the grounds, plaza and approaches in front thereof but also the driveway, plaza and grounds immediately easterly and northerly of the west-bound shelter house of the Railroad Company's passenger station

and include in particular the space in said driveway or plaza immediately to the north of the said shelter house heretofore used by public cabmen as a cab stand and parking place.

Dated, January 10, 1923.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
By R. M. WHITE,
Superintendent.

Exhibit C-19.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS, } *to wit:*

ORDINANCE

An Ordinance to regulate traffic on the driveway lying on the East side of the shelter house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American Railway Express office to Lackawanna Place.

WHEREAS, the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said town, determines that the proper exercise of its police power over the driveway mentioned in the title of this ordinance that vehicles be not allowed to park or stand along certain parts of said driveway.

THEREFORE, BE IT ORDAINED, by the said Mayor and Board of Aldermen, as follows:

1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.

2. No automobile which may be engaged in the transportation of passengers for hire shall be so

parked or so allowed to stand as prohibited in Section 1 hereof on the remaining part of the westerly side of said driveway.

3. Any person or corporation found guilty of violating this ordinance shall be liable to a fine of not exceeding Fifty Dollars or to confinement in the County Jail for not more than five days, in the discretion of the magistrate imposing the same.

Introduced January 22, 1923.

NOTICE

The above ordinance was introduced January 22, 1923, and will be considered for final passage by the Mayor and Board of Aldermen at a meeting to be held January 29, 1923, at 8 P. M., at the Vail Building, South street, Morristown, New Jersey.

Dated January 23, 1923.

VINCENT D. ROACHE,
Town Clerk.

Exhibit C-21.

January 12, 1923.

Mayor and Board of Aldermen of the Town of Morristown,
Morristown, New Jersey.

Gentlemen:

The Passenger Traffic Manager of this Railroad has directed that I transmit to you the following communication:

"After carefully examining the recent action of our Company in entering into a contract with Mr. LeClare L. Welsh of your town, providing for certain exclusive taxicab privileges in our station and on our station grounds at Morristown and your objections thereto, we cannot find that the Company has exceeded its rights or has deprived others of the enjoyment of any right. By such contract the Company does not, as has been publicly asserted, arrogate to itself the function or power of regulating the taxicab business in the Town of Morristown. It will be noted that the contract relates solely to what shall occur on the premises of the Railroad Company—to doing business by the cabmen on the premises of the Railroad Company—the solicitation of patronage in the station house and on the station grounds and the parking of vehicles thereon in furtherance of a like purpose. The cabmen never had the right without the consent of the Railroad Company to go upon its premises for such purposes. The Town of Morristown never had the power to authorize or license the cabmen to so do business upon the premises of

the Railroad Company. It follows that the contract deprives the cabmen of no right which they are entitled to enjoy against the consent of the Company and the situation is resolved to a case of the withdrawal of a privilege which has been abused.

Our Legal Department advises that the point has been so long settled that it is no longer arguable that a Railroad Company may grant exclusive privileges of the kind granted to Mr. Welsh and that a hackman or cabman in no wise connected with the Railroad Company cannot of right and against the objections of the Company go upon its grounds or into its station for the purpose of soliciting the custom of passengers and further that it is the duty of the Company to see to it that its passengers are not annoyed, disturbed or obstructed in the use either of the station house or station grounds. It is not only the Company's right but its duty to put an end to the misuse of its station grounds which has prevailed in the past and to protect its patrons from the boisterous solicitations, contentions, importunities and offensive manners of cabmen and hackmen who have been in the practice of congregating in large numbers on the Railroad's premises and in its station in pursuit of patronage and of parking their vehicles on station grounds in furtherance of a like purpose.

The Company adopted the method commonly employed by it at other stations on its line and by other roads to remedy evils of this kind, and at the same time it provided an adequate, regular, reliable and decent cab service which may be availed of by its patrons and which they have not hitherto enjoyed. It requires on argu-

ment to show that the Company cannot control taxicab activities on its premises unless there is a head to it responsive to directions and regulations of the Railroad Company.

Mr. Welsh has already expended large sums of money in providing the necessary equipment and has done and performed all other things necessary to enable him to carry out his part of the contract which has been entered into.

We therefore cannot see why, in reason, we should withdraw from the course adopted. On the other hand, there are strong reasons why we should proceed with it. We have stated some of them. Another is that the Company cannot safely acquiesce in the publicly asserted adverse right of cabmen and hackmen to occupy its premises without its consent for the purpose of doing business thereon.

However, one consideration has been advanced to which the Company desires to give practical recognition. This is the representation that some of the men now engaged in soliciting patronage at the railroad station may be thrown out of employment during the winter. To the end that this hardship may not result the Company waives the monetary consideration moving to it under the contract so that Mr. Welsh may be in a position to furnish such of these men as are in a position to give proper service, employment up to July first at the rates they have been accustomed to receive for like service.

If, as your purpose was stated to be at your last meeting, you proceed to amend or supplement your taxicab ordinances in such a manner as to deny to Mr. Welsh licenses to operate more than two taxicabs and thus defeat the

purpose of the contract to provide an adequate cab service at our station, we shall profoundly regret your action, but believe that responsibility for the result will fairly rest with you.

In conclusion, we deplore any ill feeling which may have been engendered in this matter and express the purpose on our part of avoiding, by all reasonable means, controversies with your Honorable Body or with the people of Morristown."

Yours very truly,

JLS/GL (sgd) J. L. SEAGER.

Exhibit D-1.

TO THE HONORABLE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN.

GENTLEMEN:

A petition from the patrons and commuters of the Delaware, Lackawanna and Western Railroad Company, regarding the taxicab situation, has been filed with the Police Committee for a report, and we beg to submit the following in relation thereto:

In January of 1923, the D. L. & W. R. R. Co. secured a temporary injunction restraining the licensed taxi-cab operators from parking their cars on the plaza to the northeast of the shelter house in the place designated by the Mayor and Board of Aldermen as a public taxi station. This restraining order was secured on the representation by the Railroad Company that the property occupied by the hack stand was not under the jurisdiction of the Town. In consequence of this restraining order the

Police Committee provided a taxi-cab stand for the licensed hackmen at Lackawanna Place, just in from Morris Street. The Police Committee realise that this stand is not as convenient for the traveling public as the previous one, but in order to obey the injunction secured by the Railroad Company it was the most practical location. We realise that for twenty months the travelling public has been greatly inconvenienced and that in rainy and inclement weather it added greatly to their discomfort, and in our opinion it constitutes a menace to the health of the travelling public, as well. This was particularly so during the winter weather.

The Legal Department of the Town has now established the rights of the Town to regulate foot and vehicular traffic on the plaza, which right was questioned by the Railroad Company. We are advised by our Legal Department that the Town has the right to so regulate the traffic on the so-called plaza not only by virtue of a contract in which the Lackawanna Railroad Company expressly gave such right to the Town, but also on the broad ground of the exercise of police power by the Town of Morristown. We are informed that the injunction restraining the Town from exercising its rights on the plaza has been denied by the Court and the temporary injunction secured has been dissolved. We are also informed that the Supreme Court and the Court of Errors and Appeals of the State of New Jersey has sustained the contract entered into between the D. L. & W. R. R. Co. and the Town, giving up express control of regulating the foot and vehicular traffic on the plaza. We are also informed that the Court of Errors and Appeals gave us its opinion that the Town under its police powers had the right to reasonably regulate foot and vehicular traffic on this plaza.

In view of the petition which has been filed with us and in view of the numerous complaints which the travelling public have made of the inconvenience and discomfort to which they have been put by the present arrangement, we feel that the request contained in the petition is reasonable and should be complied with. We have, therefore, worked out a plan for the parking of the private cars and the public taxi-cabs which we believe will provide a better arrangement at the depot than now exists, and which we believe will better protect the safety and health of the travelling public.

As a first step in this program we offer and recommend for passage an ordinance fixing the public hack stand at the place which it occupied almost continuously since 1912, excepting only the period covered by the restraining order now dissolved.

Respectfully submitted,

(Signed) JAMES G. LIDGERWOOD
MURRAY H. COGGESHALL
J. R. EICHLEN

Dated October 8, 1924.

NEW JERSEY SUPREME COURT.

LACLARE L. WELSH,
Prosecutor,

vs.

THE TOWN OF MORRISTOWN, *et als.*,
Defendants.

Transcript of testimony taken on behalf of the defendants, by consent, before Nicholas W. Bindseil, a Supreme Court Commissioner of New Jersey, at the residence of the witness, John J. Todd, 56 Hill street, Morristown, New Jersey, on Wednesday, March 28, 1923, at 11 A. M.

APPEARANCES:

MR. NATHANIEL C. TOMS and MR. CONOVER ENGLISH for defendants.

MR. MAXIMILIAN M. STALLMAN for prosecutor.

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witness may be taken stenographically and afterwards reduced to typewriting, the signature of the witness to his said testimony being waived.

JOHN J. TODD, a witness called on behalf of defendants, being duly sworn according to law, on his oath testified as follows:

DIRECT EXAMINATION BY MR. ENGLISH:

Mr. English: I offer in evidence an act entitled, "An act to incorporate the Morris and

Essex Railroad Company, passed January 29, 1835, as found in the public acts of New Jersey, bound volume, indexed on the back 1828-1835.

Mr. Stallman: I object to it as being incompatent, irrelevant and immaterial.

(Marked Exhibit D. 1.)

Q. Mr. Todd, you are a resident of Morristown? A. I am.

Q. Did you ever hold an official position in Morristown? A. Yes.

Q. Were you ever mayor? A. Yes.

Q. From what year to what year? A. January 1, 1913, to January 1, 1915.

Q. At the time you were mayor was the construction under way of the change of the grade of the Lackawanna Railroad tracks? A. It was.

Q. Pursuant to an agreement which had been entered into between the town and the railroad, dated September 24, 1912? A. Yes.

Q. You knew of the existence of that agreement? A. I did.

Q. Were you a member of the governing body at that time? Were you an alderman or city official at that time? A. Mayor.

Q. You were mayor in 1912 when that contract was made? A. No, I misunderstood you.

Q. Did you know of the making of the contract at the time? A. From what I derived from the newspapers.

Q. General knowledge about it? A. General knowledge.

Mr. English: I offer in evidence a copy of the contract between the mayor and board of aldermen of the Town of Morristown and the Morris and Essex Railroad Company and the D., L. & W. Railroad Company, dated Septem-

ber 24, 1912. I will have marked a copy, subject to correction, if that is satisfactory.

Mr. Stallman: It is.

(Marked Exhibit D. 2.)

Q. Mr. Todd, I produce a paper edition, entitled, "Charter and Ordinances of the Town of Morristown, 1908," are you familiar with that book? A. Yes, I am.

Q. That is the official publication of the Town Ordinances? A. It is.

Q. In particular are you aware of an ordinance published in this book, beginning at page 71, entitled, "An ordinance concerning licenses to hackmen and others," approved and signed July 16, 1878, and I call your particular attention to section 14 of that ordinance, on page 73 of the printed book? A. Yes, I am.

Mr. English: I offer in evidence the ordinance, and call particular attention on the record to section 14 of the ordinance just mentioned, found on page 73 of the printed book.

Mr. Stallman: I object to the offer of the ordinance or any particular section thereof, on the ground that the existence of any ordinance at this time, or any prior time, is incompetent, immaterial and irrelevant on the question of the legality of the ordinance under review.

Mr. English: You have no objection to the form of the proof of this book?

Mr. Stallman: No.

"Sec. 14. The Mayor is hereby authorized to designate such places within the town of Morristown as public stands for hacks, cabs, omnibuses, stages, carriages and other licensed vehicles, as he may deem expedient and proper, and to make such regulations and give such di-

rections respecting the places or positions to be occupied by carriages or vehicles of any description, at the public stands or at the railroad stations, or elsewhere, as may be necessary to preserve order and promote public convenience; any person who shall neglect or refuse to obey any regulations or directions of the Mayor, authorized to be made or given by him, shall forfeit and pay a sum of not exceeding Ten Dollars for each and every offense."

Q. Mr. Todd, this section 14 of the ordinance, now in evidence, authorizes the mayor to designate such places within the Town of Morristown as public hack stands, as he may deem expedient and proper, and authorizes him to make such regulations and any such directions respecting the places or positions to be occupied by carriages or vehicles of any description at public stands at the railroad station or elsewhere, as may be necessary to preserve order and promote the public convenience. Did you, pursuant to that section of the ordinance, make any designation of a hack stand on the plaza of the Lackawanna Railroad after the construction of the improvements had been completed, pursuant to the agreement D. 2 in evidence?

Mr. Stallman: I object to the question on the ground that whether or not any such designation was made by the mayor at that time is immaterial and irrelevant to the question of the validity of the ordinance under review.

A. I did.

Q. Where did you designate such hack stands to be?

Mr. Stallman: I object to that question on the same ground stated in the objection to the preceding question.

A. At the main station, at the wall at the end of the terrace.

Q. On the east or west side of the tracks? A. I think that is the west side—the main entrance to the station.

Q. Where else? A. There was a walk in between, and the east side I designated as a hack stand and cab stand.

Q. Did you designate any other stand? A. I did, on the opposite side, the east side, so-called, just opposite the railroad station. First, that did not work out satisfactorily, making a confusion and congestion of traffic. I abolished the stand opposite, and made a new stand alongside of the station, between the express office and the entrance.

Q. By the side of the station, you mean where? A. Right up against the sidewalk.

Q. Which runs along the— A. Yes.

Mr. Stallman: May I inquire whether these designations were made in any official way in writing?

The Witness: They were not, sir; it wasn't the custom, in those days, to put them in writing.

Q. I show you the blue print, entitled, "Station Grounds at Morristown, N. J., which outlines in yellow what we call the station plaza.

Mr. Stallman: I think, Mr. English, that your interpretation of the yellow lines is a little incorrect. The yellow lines are intended to show the boundary of all of the property of the railroad company, and includes property which cannot be designated as plaza.

Mr. English: I will accept the correction in my statement, but it does, incidentally, include the station plaza.

Mr. Stallman: Exactly.

Q. I call your attention to this map and point out to you the driveway on the west side of the station, which you just mentioned as having designated cab stands; there appear to be two places outlined in green here—do they indicate about where you designated the cab stands? A. Yes.

Q. On the east side of the track there is outlined in green, on this map, along the driveway by the easterly wall, between the entrance to the passenger tunnel and the express office, a parking place; is that the place which you designated on the easterly wall?

Mr. Stallman: I object on the ground that whatever taxicab stand the mayor may have designated at that time, under the ordinance which has been offered in evidence, is immaterial and irrelevant to the issues in this case.

A. Yes.

Q. That, as I understand it, is the second designation you made on the easterly side of the track? A. That is correct.

Q. Can you indicate on the map where you made the first designation? A. It was directly opposite the green designation.

Q. Along what was designated on this map "Concrete Walk" by the flower bed? A. There is a little triangular park.

Q. This map has the words "Flower Bed" written in there. A. There are no flower beds there.

Q. That is what is on the map? A. Yes.

Q. Was it along by the concrete walk, by that place labeled "Flower Bed"? A. It was.

Q. On the easterly side of the railroad track? A. Yes.

Q. That was the first designation on the easterly side? A. Yes.

Q. And the second one is the one now outlined in green? A. Yes.

Q. You said, in answer to Mr. Stallman's question, that this designation was not in writing. Was it called to the attention of anybody in the city government; the police department, for example? A. The police were notified.

Q. And were any instructions given to them to enforce this regulation or ordinance? A. They were instructed.

Q. And to your knowledge did they enforce it? A. They did.

Q. So that during your term as mayor all cabs were required to park at the place you outlined on this station plaza? A. Yes.

Q. What steps were taken by the city government to enforce that; what instructions were given to the police?

Mr. Stallman: Objected to on the ground that any evidence taken by the Town of Morristown to carry out the use of the taxicab stand as indicated by the mayor is irrelevant and immaterial to the issues of this case, and on the further ground that any instructions issued by the mayor to the police of the Town of Morristown are not binding in any way upon the prosecutor in this writ, or upon the railroad company, under whose license this prosecutor is operating.

Mr. English: I won't press that question.

Q. What did the policemen do, to your knowledge, with respect to regulating the use of these taxicab stands or hack stands?

Mr. Stallman: Objected to on the ground that whatever the policemen may have done pursuant to any instructions received from the mayor is immaterial and incompetent on the issues of this case.

A. The police were instructed by myself to see that the cabmen occupied the space which I had allotted to them.

Q. To your knowledge did they carry out those instructions? A. They did.

Q. Did you make yourself familiar with the situation? A. I carried them out sometimes, when I caught them infringing, and suspended their licenses, which I had authority to do under the ordinance.

Q. And did you do that in more cases than one? A. I suspended quite a number.

Q. For infringements of the regulations on the station plaza? A. Yes.

Q. What was the fact with respect to the police patroling of that station plaza; did the police officers do that; was it included in their beats? A. Yes.

Q. And do you know to what extent the police had an oversight over this station plaza? A. As much as in any city streets.

Q. You are familiar with this contract between the town and the railroad, Exhibit D. 2; I call your attention to that part of it under the caption "Passenger Station," and particularly to the second paragraph under that caption, which says that "it is further agreed that the town may and shall exercise all necessary police powers in and upon the station grounds, approaches and driveways, for the pur-

pose of regulating foot and vehicular traffic at said station." Did you know of that provision in the contract when you made your designations of these cab stands? A. I did.

Q. Did you know that when you gave instructions to the police with respect to regulating the traffic on the station plaza? A. I did.

Q. Since you have retired from the office of mayor, have you kept yourself informed of the situation generally in Morristown at the station platform? A. I have.

Q. Have you been down there frequently? A. Yes.

Q. To your knowledge has the city exercised police jurisdiction over this plaza?

Mr. Stallman: I object on the ground that that calls for a conclusion of law.

A. It has.

Q. What have you seen with your own eyes to indicate that the town is exercising jurisdiction over that station?

Mr. Stallman: I also object to that on the ground that it calls for a conclusion.

A. I have observed policemen on duty on the station property almost continuously at any time, day or hour, that I happened to be in that locality.

Q. And about how often would you say that you had been around the station plaza? A. Since I have been mayor?

Q. Yes, while you were mayor and since you have retired? A. One hundred or two hundred times.

Q. Would you go down there as often as once a week, on an average? A. Yes.

Q. Have you observed whether the public cabs have occupied those cab stands which you created, during all this period? A. I have; they have done so.

Q. Do you know whether there are any traffic signs set up on the station plaza? A. There are.

Q. Were they put up during your term, do you remember? A. I am not positive of that fact. They were either put up in my time or very shortly thereafter.

Q. And they have been there for a long time, to your personal knowledge? A. Yes.

Q. During your term of mayor was any question ever raised by the railroad of the right of the town to regulate passenger traffic on that station plaza?

Mr. Stallman: That is objected to on the ground that it is immaterial to the issues of this case.

A. Never.

Q. This contract, Exhibit D. 2, as signed on September 24, 1912, about the time, I imagine, you were a candidate for office, were you not? A. Yes.

Q. And I presume you took a lively interest in the discussion which was then on with respect to this elevation? A. I did.

Q. Did you have any conference or conversation with railroad officials or town officials, preliminary to the signing of this agreement or the making of it? A. No, not preliminarily.

Mr. English: I offer in evidence the blue print, entitled "Station Grounds at Morristown, N. J., which was referred to by the witness in his testimony.

(Marked Exhibit D. 3.)

Mr. Stallman: No cross examination.

Exhibit D-3.

"Sec. 14. The Mayor is hereby authorized to designate such places within the town of Morristown as public stands for hacks, cabs, omnibuses, stages, carriages and other licensed vehicles, as he may deem expedient and proper, and to make such regulations and give such directions respecting the places or positions to be occupied by carriages or vehicles of any description, at the public stands or at the railroad stations, or elsewhere, as may be necessary to preserve order and promote public convenience; any person who shall neglect or refuse to obey any regulations or directions of the Mayor, authorized to be made or given by him, shall forfeit and pay a sum not exceeding Ten Dollars for each and every offense."

Exhibit D-4.

An Ordinance to regulate traffic on the driveway lying on the East side of the Shelter house of the Delaware Lackawanna & Western Railroad Company in Morristown, extending from the American Railway Express Office to Lackawanna Place.

WHEREAS, the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said Town, determines that the proper exercise of its police power over the driveway mentioned in the title of this ordinance that vehicles be not allowed to park or stand along certain parts of said driveway;

THEREFORE, BE IT ORDAINED, by the said Mayor and Board of Aldermen as follows:

1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance way to the shelter house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.

2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in Section 1 hereof on the remaining part of the westerly side of said driveway.

3. Any person or corporation found guilty of violating this ordinance shall be liable to a fine of not exceeding Fifty Dollars or to confinement in the

County Jail for not more than five days, in the discretion of the magistrate imposing the same.

Introduced January 22, 1923.
Passed, approved and signed February 7, 1923.

CLYDE POTTS,
Mayor.

Attest:
VINCENT D. ROACHE,
Town Clerk.

I hereby certify that the above ordinance was introduced at a meeting of the Mayor and Board of Aldermen of the Town of Morristown, held January 22, 1923, was duly advertised for further readings and final passage on February 7, 1923, at which time it was duly passed by the Mayor and Board of Aldermen and was duly signed by the Mayor and attested by the Town Clerk, and was afterwards published according to law.

WITNESS my hand and the corporate seal of the Town of Morristown, July 28, 1923.

VINCENT D. ROACHE,
Town Clerk.
(Seal)

STATE OF NEW JERSEY.
DEPARTMENT OF STATE

THE COMMISSIONER OF MOTOR VEHICLES

The attached ordinance is hereby approved as being a proper ordinance within the meaning of Section twenty-five of Chapter 156, P. L., 1915.

W. L. DILL.
Commissioner of Motor Vehicles.

(L. S.)

Exhibit D-5.

A supplement to an ordinance entitled, "An Ordinance concerning licenses to hackmen and others," approved and signed July 16, 1878.

BE IT ORDAINED, by the Mayor and Board of Aldermen of the Town of Morristown, being the governing body of said Town as follows:

1. Public hack stands shall be and they are hereby designated and established as follows: (1) along the park opposite Henry M. Smith's drug store and extending from the corner of the park towards Morris Street a distance of one hundred and fifty feet; (2) along the curb on the northerly side of Morris Street in front of the station and railroad property of the Delaware, Lackawanna & Western Railroad Company; (3) along the West side of Lackawanna Place along a line five feet from the Railroad retaining wall, a distance of ninety feet six inches from the bridge abutment on the North side of Morris Street; and (4) along said West side of Lackawanna Place along a line five feet from the railroad retaining wall a further distance from said bridge abutment on the North side of Morris Street of ninety-five feet, to the end of said side of said street; (5) along the West side of James Park.

2. No owner or driver of any vehicle licensed under this ordinance shall stand the same, while waiting for employment, at any railroad station or any place of public assemblage or entertainment in the Town of Morristown, or at or in any street or driveway therein, except in such places as are or shall be designated as hack stands by the Mayor and Board of Aldermen, nor shall the owner or driver of such

licensed vehicle awaiting employment at any designated stand leave the said vehicle, nor shall he move the same from the designated stand to take a passenger or passengers until summoned therefor, either by said passenger or passengers, or by an officer of the Town charged with that duty, nor shall he solicit custom for any such licensed vehicle awaiting employment when away or off from said hack stand. No owner or driver of any such licensed vehicle while awaiting employment or otherwise, shall solicit custom in any noisy persistent or offensive manner, nor use indecent or profane language, nor be guilty of boisterous talking or shouting or any disorderly conduct; nor vex or annoy travelers or citizens, nor at any time employ or permit any other person to ask or solicit said custom. No owner or driver of any such licensed vehicle, the same being disengaged, shall refuse to carry any orderly person and his baggage, as designated in said ordinance, to any place in the Town of Morristown, nor extort or demand any sum for so doing other than he is entitled to receive under said ordinance, and every owner and driver, on being engaged, shall display in a conspicuous place on his said licensed vehicle a placard bearing the word "Engaged," such placards to be furnished by the Town Clerk. Any such licensed vehicle without such placard being thus displayed shall be taken and construed as being disengaged.

3. Any person violating any of the terms of this ordinance shall be liable, for each and every violation, upon conviction to a fine of not exceeding fifty dollars or confinement in the county jail for not exceeding five days in the discretion of the magistrate imposing the same.

4. All parts of ordinances inconsistent with this ordinance are hereby repealed.

Introduced August 6, 1923.
Passed, approved and signed September 18, 1923.

CLYDE POTTS,
Mayor.

Attest:
VINCENT D. ROACHE,
Town Clerk.

I, Vincent D. Roache, do hereby certify that the foregoing ordinance is a true copy of an ordinance passed by the Mayor and Board of Aldermen of the Town of Morristown and approved and signed by the Mayor thereof September 18, 1923, as the same stands upon the records of the said town.

IN WITNESS WHEREOF, I have hereto set my hand as Town Clerk and the common seal of the said Town the twenty-sixth day of September, Nineteen Hundred and Twenty-three.

VINCENT D. ROACHE,
Town Clerk of the Town of Morristown.

(Town Seal)

STATE OF NEW JERSEY
DEPARTMENT OF STATE.

THE COMMISSIONER OF MOTOR VEHICLES

The attached ordinance is hereby approved as being a proper ordinance within the meaning of section twenty-five of Chapter 156, P. L., 1915.

W. L. DILL,
Commissioner of Motor Vehicles.

(Seal)

Assignment of Errors of Town of Morristown.

(Filed July 24, 1925.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant, vs. THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*, Defendants.	In Equity.

The Town of Morristown, defendant-appellant, respectfully makes the following assignment of errors in the above entitled cause, to be relied on in its appeal from the Final Decree made and entered on the 29th day of June, 1925.

1. Said Final Decree is broader than the prayer of the bill of complaint.

2. Said Final Decree is contrary to law.

3. Said Final Decree is contrary to the evidence.

4. Said Final Decree adjudicates the said ordinance illegal and void, as in violation of the Fourteenth Amendment of the Constitution.

5. Said Final Decree ignores the force and effect of the so-called elevation contract between the Del-

aware Lackawanna & Western Railroad Company and the Town of Morristown, dated September 24th, 1912.

6. Said Final Decree enjoins and prevents the Town of Morristown from in any manner, regulating the foot and vehicular traffic at the station grounds.

7. Said Final Decree enjoins and prevents the Town of Morristown from in any manner regulating public and private vehicles en route to and en route from the said station grounds, irrespective of where they may be within the municipal limits of the said Town.

8. Said Final Decree enjoins and prevents the Town of Morristown from passing and adopting ordinances for the purpose of regulating cab service or vehicular traffic, within the municipal limits of the said Town affecting said station grounds.

9. Said Final Decree enjoins and prevents the Town of Morristown from the lawful exercise of governmental powers vested in it as a municipal corporation.

10. Said Final Decree enjoins and prevents the Town of Morristown from enforcing the ordinance lawfully passed and adopted on October 22nd, 1924.

11. The Trial Judge denied the said defendants motions to dismiss the Bill of Complaint for lack of parties.

12. The Trial Judge refused to permit the said defendants' counsel to ask the following questions:

a. To the complainant's witness, Griffith:

"Q. And so far as you can judge, by looking at the things on the ground you can't tell where Lackawanna Place leaves off and the driveway on the station property begins, can you?"

b. To the defendants' witness, Potts:

"Q. Where in the judgment of the municipal authorities of the Town of Morristown is the most effective and beneficial place from the standpoint of the public welfare for the establishment of a public hack stand on the east side of the Lackawanna tracks at the station?"

c. To the defendants' witness, Potts:

"Q. Is Mr. Welsh with three licensed cabs able to take care of the traveling public at the Morristown Station?"

"Q. I will come back to my original question. In view of the policy which you have stated of the Town of Morristown with respect to licensing additional cabs and the effect of that on existing cab licenses has Mr. Welsh with his three cabs sufficient equipment to take care of the traveling public at Morristown?"

d. To the defendants' witness, Todd:

"Q. What is the policy of the Board with respect to increasing licenses for cabs in Morristown?"

"Q. What would be the effect of the issuing of new licenses on the existing licenses?"

e. To the defendants' witness, Toms:

"Q. How much did the Town of Morristown pay the Lackawanna Railroad in connection with the work done and to be done under the elevation contract in evidence in this case?"

13. The Trial Judge permitted the complainant's counsel to ask the following questions, over the objection of the defendant:

a. To the complainant's witness, Welsh:

"Q. Now, just before that contract was made, tell the Court what the conditions were at the station with reference to taxicabs and taxicab service there."

b. To the complainant's witness, Welsh:

"Q. What was said," when Mr. Seager appeared before the Board of Aldermen.

c. To the defendants' witness, Potts:

"Q. Did you within the last month or so after you found out that Hough was working for Welsh, did you make the statement you would like to revoke his license?"

14. The Trial Judge admitted in evidence, over the defendants' objection, a certain notice, Exhibit C-17; also a certain letter, Exhibit C-21.

15. The Trial Judge permitted the complainant's counsel, over the objection of the said defendants' counsel, to read excerpts from the ex parte affidavit of Henry Laden.

Assignment of Errors of Town of Morristown.

16. The Trial Judge refused to admit in evidence the report of the Committee of the Board of Aldermen, Exhibit D-1 for identification.

WHEREFORE your appellant, assigning the foregoing errors, prays that the said Final Decree may be reversed and that such directions may be given in respect to the matters herein referred to in favor of this appellant as prayed for in the petition of appeal, with costs to be taxed.

N. C. TOMS,
Solicitor of the Town of Morristown.

CONOVER ENGLISH,
Of Counsel for the Town of Morristown.

Assignment of Errors of Henry Laden, *et al.*, Cab Men.

(Filed August 12, 1925.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainant,	
vs.	In Equity.
THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*, Defendants.	

Henry Laden, Millard Laden, Francis Schmidt, Rudolph Beiser, Joseph Murphy, Daniel Murphy, Anson R. Durling, John W. Tolar, Thomas Powers, Lee Bracey, Ziba Donnelly, John H. Tanner, Richard T. Burton, Joseph Grant, William Bracey, George Van Ness and Joseph Greenberg, defendants-appellants, respectfully make the following assignment of errors in the above entitled cause, to be relied on in their appeal from the Final Decree made and entered on the 29th day of June, 1925.

1. Said Final Decree is broader than the prayer of the bill of complaint.

2. Said Final Decree is contrary to law.

3. Said Final Decree is contrary to the evidence.

Assignment of Errors of Henry Laden, et al., Cab Men.

4. Said Final Decree adjudicates the said ordinance illegal and void, as in violation of the Fourteenth Amendment of the Constitution.

5. Said Final Decree ignores the force and effect of the so-called elevation contract between the Delaware Lackawanna & Western Railroad Company and the Town of Morristown, dated September 24th, 1912.

6. Said Final Decree enjoins and prevents the Town of Morristown from in any manner, regulating the foot and vehicular traffic at the station grounds.

7. Said Final Decree enjoins and prevents the Town of Morristown from in any manner regulating public and private vehicles en route to and en route from the said station grounds, irrespective of where they may be within the municipal limits of the said Town.

8. Said Final Decree enjoins and prevents the Town of Morristown from passing and adopting ordinances for the purpose of regulating cab service or vehicular traffic, within the municipal limits of the said Town, affecting said station grounds.

9. Said Final Decree enjoins and prevents the Town of Morristown from the lawful exercise of governmental powers vested in it as a municipal corporation.

10. Said Final Decree enjoins and prevents the Town of Morristown from enforcing the ordinance lawfully passed and adopted on October 22nd, 1924.

Assignment of Errors of Henry Laden, et al., Cab Men.

11. The Trial Judge denied the said defendants' motions to dismiss the Bill of Complaint for lack of parties.

WHEREFORE your appellants, assigning the foregoing errors, pray that the said Final Decree may be reversed and that such directions may be given in respect to the matters herein referred to in favor of these appellants as prayed for in the petition of appeal, with costs to be taxed.

JAMES H. BOLITHO,
Solicitor for Defendants,
Henry Laden, *et al.*, cab men.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainants, vs. THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*, Defendants.	In Equity.

Complainant and the defendants hereby stipulate as follows:

It is hereby stipulated and agreed, and it is requested by the solicitors for all the parties, that permission be granted to print the entire transcript of the record of the trial in the form of a question and answer as given, and that an order to that effect be granted by this Court.

Dated, September 21, 1925.

MAXIMILIAN M. STALLMAN,
Solicitor of Complainant.

N. C. TOMS,
Solicitor of Defendant, Town of Morristown.

JAMES H. BOLITHO,
Solicitor of the individual defendants, Henry Laden, et al.

So Ordered.

U. S. District Court Judge.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainants, vs. THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*, Defendants.	In Equity.

It is hereby stipulated and agreed as follows:

1. That the portion of the record in this case which relates to the appeal taken by the individual defendants, Henry Laden, et al., from the Final Decree dated June 29th, 1925, including the Assignment of Errors, shall be printed as part of the record in the appeal of the defendant Town of Morristown; that it shall not be printed separately, but that the appeal shall be consolidated and heard upon one printed record.

And it is requested by the solicitors for the parties above mentioned that an Order to that effect be granted by the Court.

2. That Exhibits C-1 and C-2 need not be printed. Exhibit C-1 is a lease between the Morris & Essex Railroad Company and the D. L. & W. R. R. Co. dated December 10, 1868. Exhibit C-2 is an Act of the Legislature of New Jersey, (P. L. 1869,

page 28, Chapter 23) confirming said lease. Said lease, Exhibit C-1, leases "all and singular, the property, things, franchises, immunities, rights, powers and privileges hereinbefore granted, leased and demised, with the hereditaments and appurtenances in anywise thereunto appertaining, unto the D. L. & W. R. R. Co. from December 31, 1868,

"for and during the full term of the continuance of the Charter"

of the Morris & Essex Railroad Company, and during the full term of the continuance of said Charter by virtue of any and all renewals thereof that may at any time hereafter be granted or made, and includes after acquired property.

3. That Exhibits C-3 to C-12 inclusive, and Exhibit C-14 need not be printed. The land mentioned and described in said deeds comprises the right of way and station grounds at Morristown, and was conveyed to, and is owned by the Morris & Essex Railroad Co., the lessor of the complainant, D. L. & W. R. R. Co.

4. Exhibit C-13 need not be printed but may be exhibited if necessary. Exhibit C-13 is a "Deed from Morristown & Erie Railroad Co. to the Morris & Essex Railroad Co. dated April 23, 1913, and recorded in Book B-22 of Deeds for Morris County at page 188. Conveys premises in Town of Morristown, Morris County, New Jersey, as follows:

"All that certain strip of land, known as 'Saw Mill Lane,' formerly leading into Caskey's Mill through the property of The Morris & Essex Rail-

road Company, from the Northeasterly line of Morris Street to the Southerly side of a private driveway, distant about Four Hundred Eighty (480) feet Northeastely from the aforesaid Northeasterly line of Morris Street, said Lane being Nineteen and eight tenths (19.8) feet in width and being in two parcels containing Five thousand three hundred and eighty-five (5,385) and Two thousand two hundred eighty-seven (2,287) square feet of land mor or less, respectively, all as shown in Yellow tint on Blue Print hereto attached and hereby made a part of this description.

Subject, however, to any rights or right of passage thereon which may exist in favor of C. W. Ennis & Company, and the Swift Beef Company, and to the rights of the Town of Morristown, and The Morris & Essex Railroad Company, and any and all other rights, easements or claims thereof." Note: The first of said parcels is South, and the second is North, of the right of way of the Morris & Essex Railroad.

5. That Exhibit C-18, which is the record of the proceedings in the New Jersey Court of Chancery in a cause wherein Delaware, Lackawanna & Western Railroad Company was complainant, and Henry Laden and others were defendants, need not be printed but may be exhibited if required.

6. That Exhibits C-22 and D-7, which are photographs and also such maps as were made a part of the record at the hearing, need not be included in the State of the Case, but may be exhibited to the Circuit Court of Appeals at the time of the argument.

Stipulation.

7. That all exhibits which were marked for identification only and not in evidence, are neither to be printed, nor exhibited to the Circuit Court of Appeals on the argument.

8. That the remaining exhibits, namely Exhibits C-15, C-16, C-17, C-19, C-20, C-21, C-25, D-1, D-2, D-3, D-4, D-5, and D-6 be printed as a part of the record on appeal.

MAXIMILIAN M. STALLMAN,
Solicitor for Complainant.

N. C. TOMS,
Solicitor of Defendant, Town of Morristown.

JAMES H. BOLITHO,
Solicitor of the individual defendants, Henry Laden, et al.

So Ordered.

U. S. District J.

Stipulation.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY,
Complainants,

vs.

THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*
Defendants.

In Equity.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action as agreed on by the parties, and is the record upon which it is agreed the said appeal shall be argued.

Dated, September 21, 1925.

MAXIMILIAN M. STALLMAN,
Solicitor of Complainant.

N. C. TOMS,
Solicitor of Defendant, Town of Morristown.

JAMES H. BOLITHO,
Solicitor of the individual defendants, Henry Laden, et al.

Clerk's Certificate.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

THE DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY, Complainants, vs. THE MAYOR and BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.* Defendants.	In Equity.

I, George T. Crammer, Clerk of the District Court of the United States of America for the District of New Jersey, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled action as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at Trenton, New Jersey, in the District of New Jersey, this day of September, in the year of our Lord, one thousand nine hundred and twenty-five, and of the Independence of the United States, one hundred and forty-ninth.

GEORGE T. CRAMMER,
Clerk.

(Seal)

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OPINIONS.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

October Term, 1925.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Complainant-Appellee, vs. THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, Defendants-Appellants.	No. 3391.

Appeal From the District Court of the United States for the District of New Jersey.

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is an appeal from a final decree of the District Court declaring an ordinance of the Town of Morristown, New Jersey, designating a taxicab stand on property belonging to the railroad company near the station unconstitutional and enjoining the town from enforcing the ordinance and Henry Laden and sixteen other taxicab drivers from entering upon the property of the company at or near its passenger

station for the purpose of soliciting custom or patronage and from standing or parking their taxicabs and vehicles upon the station grounds of the company.

The company operates a railroad from New York City through Morristown to Buffalo, New York. The land in question was leased in 1868 by the company, which handles about three thousand passengers daily in and out of Morristown. The tracks and station are flanked on both sides by areas and driveways for ingress to and egress from the station.

The tracks of the company through Morristown were formerly at grade, but on September 24, 1912, the company and the town entered into a contract in accordance with which the tracks were elevated. This contract defined the relative rights and duties of the parties in respect to the elevation of the tracks. It provided *inter alia* that:

> "Each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for."

The contract was admittedly performed by both parties. The company in its contract agreed to lay out the driveway where the parking place, designated in the ordinance, is now located. The main station building is on the west side of the tracks and a roofed-over platform is on the east side and constitutes what is called a "shelter house." There is a driveway on the easterly side of the shelter house and the cab stand is along the curb of the driveway just north of the shelter

house. This same place was designated as a cab stand by Mayor Todd shortly after the tracks were elevated pursuant to the contract between the town and the company of September 24, 1912, and had been so used until December 28, 1922, when the railroad company entered into a contract with La-Clare L. Welsh whereby it purported to give him the exclusive right of parking taxicabs at the old cab stand and of soliciting business as a cabman on the station grounds.

The railroad company filed a bill in the Court of Chancery of New Jersey and obtained from it an order enjoining taxicab drivers from parking their cabs on the property of the company including the cab stand and driveway. The town then by ordinance established a parking place just south of the driveway and abolished the old parking place originally established by Mayor Todd, which was then used exclusively by Welsh. Thereupon Welsh applied to the Supreme Court of New Jersey for a writ of certiorari to set aside the ordinance abolishing the parking place which he occupied by virtue of his contract with the railroad company. The Court sustained the ordinance, and on appeal its judgment was affirmed by the Court of Errors and Appeals. Welsh v. Morristown, 98 N. J. L. 630; Welsh v. Potts, 99 N. J. L. 528. The town then by the ordinance in question re-established the old parking stand, and the railroad company, being a Pennsylvania corporation, filed its bill of complaint in the Federal Court of New Jersey praying for an injunction restraining the town from enforcing the ordinance and the taxicab drivers from soliciting custom or parking their taxicabs on its premises as above stated. The District Court grant-

ed a temporary injunction, which after hearing was made final.

The railroad company contends that the ordinance is unconstitutional in that its effect is to deprive it of its property without due process of law and without just compensation.

The town did not condemn the property designated as a taxicab stand as it had the inherent power to do by virtue of its right of eminent domain. It is a fundamental principle of law, recognized in both the state and federal constitutions, that private property may not be taken for public use, the only use for which it may be taken under any circumstances, without due process of law and just compensation. Neither may an owner be deprived of any of the essential attributes of his property without like process and compensation. Bill Posting Sign Company v. Atlantic City, 71 N. J. L. 72; Ignaciunas v. Risley, 98 N. J. L. 712; Pennsylvania Coal Company v. Mahon, 260 U. S. 393. The property of a railroad company is private property and entitled to constitutional protection just as any other private property. Spottiswoode v. Morris & Essex R. R. Co., 61 N. J. L. 322; Skaggs v. Kansas City Terminal Railway Co., 233 Fed. 827; Western Union Telegraph Company v. Pennsylvania Railroad Co., 195 U. S. 540. But every citizen holds his property subject to the proper exercise of the police power of the State legislature directly or by public or municipal corporations to which the legislature has delegated it. Laws and ordinances relating to health, good order, public safety and general welfare are police laws or regulations. It is well settled that such laws, though they may disturb the enjoyment of in-

dividual rights, are constitutional, although compensation is not made for such disturbance. The deprivation of the enjoyment of property under such circumstances, is not within the meaning of the Constitution, a taking of private property for public use, but is simply a regulation of its use and enjoyment by the owner.

Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be *"juris privati"* only, and is "affected with a public interest." It then becomes subject to public regulation, and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer. Dillon's Municipal Corporations, 1 Vol. (5th Ed.), section 301; Welsh v. Morristown, 98 N. J. L. 630; Munn v. Illinois, 94 U. S. 113; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372; Producers Transportation Co. v. Railroad Commission, 251 U. S. 228.

The test of whether or not a law in its effect upon the enjoyment of property is the taking of property without due process and just compensation, depends upon whether or not under all the circumstances the enactment of the law was a reasonable exercise of police power and was justified by public necessities, or was unreasonable and arbitrary. Oregon R. R. & N. C. v. Fairchild, 224 U. S. 510, 524; Great Northern Railway v. Minnesota, 238 U. S. 340; Great Northern Railway v. Cahill,

253 U. S. 71. "It is presumed that the municipality which is entrusted with the public safety and convenience of travelers is the best judge of the conditions and environments, and that it will not act in an unjust or oppressive manner, but for the good of the community." Ex parte Vance, 62 Southwestern Reporter 568. Mayor Potts said:

> "The police committee had a conference and decided after 14 or 15 months of trial with the cab stand on Lackawanna Place it was not as desirable a place to have the cabs stand while they were waiting for their fares, that it was inconvenient to the traveling public, and in rainy and bad weather it constituted a menace to their health, and therefore they recommended to the Board that the taxicab stand be moved back to the place it had occupied for some ten or twelve years, and recommended the passage of an ordinance fixing that as a stand where the cabs waiting for fares could wait."

No attack has been made upon the particular place designated for the cab stand as an unreasonable place nor has there been upon the ordinance as an unreasonable exercise of police power. The contention is that the town was without power and not without reason. Three thousand people daily used the station. There were at times many automobiles, taxicabs and persons coming to and going from the station and crowding its approaches. In this situation, amidst more or less confusion, we think that it was not an unreasonable exercise of police power to enact the ordinance establishing the parking place. The establishment of such a place would necessarily tend toward good order and public safety.

The contract between the railroad company and Welsh did not deprive the town of the power to enact the ordinance. The driveway was devoted to a public use. Whatever right the contract conferred upon Welsh, it did so in view of, and not in subordination to, the right of the town to exercise its police power to regulate traffic in the driveway. The law silently incorporated itself into the contract, of which Welsh and the railroad company had to take cognizance when they entered into the contract. Welsh v. Morristown, 98 N. J. L. 630, 635; Lindsey v. Mayor, etc., of Anniston, 16 Southern Reporter (Ala.) 545, 547.

The town contends that the railroad company authorized it to establish the cab stand by its contract of September 24, 1912. It provides:

> "that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto."

This provision authorized the town to do two things: To regulate foot and vehicular traffic about the station, station grounds, approaches and driveways; and to enforce the rules and regulations of the railroad company in respect to the traffic. In performing the first duty, the town was to make its own rules and laws in accordance with which it would regulate the traffic. In doing the second, it was simply to enforce the rules and regulations made by the company. But the town had the power to make rules and regulations independently of the contract. As Mr. Justice Trenchard said in his able

opinion in the case of Welsh v. Morristown, *supra:* "The town had authority not only by virtue of its police powers but by express grant from the railroad company, owning the fee, to regulate traffic thereon." The town, therefore, in enacting the ordinance establishing the parking place and in enforcing the same was exercising the police power, delegated to it by the State and granted to it by the company. In other words, in addition to the power which the town had to regulate the use of private property for private purposes, the railroad company conferred upon it power to regulate traffic on its property, by two acts: First, by devoting its property to public use and thus affecting it with a public interest; and second, by entering into the contract which expressly granted that power.

The ordinance does not violate the constitutional rights of the company and, therefore, the decree of the District Court is reversed with directions to dismiss the bill with costs.

BUFFINGTON, *J.*, dissenting.

Under whatever form of words the matter may be stated, the simple fact is that the railroad's property has been taken from it without compensation and it is now denied possession of its own ground. In its agreement with the city, it asserted its private ownership of this private road, so what has been now taken for public use, under the guise of public property, is in fact private property. Because the Constitution forbids taking private property for public use without compensation, I record my dissent. What happened was that the railroad laid out and built a "driveway and station ground approach;" it granted a public right of access to

and from its station over such driveway in these words: "Said driveway shall be kept open at all times for passengers, pedestrians * * * and general vehicular traffic to and from the station;" but far from surrendering its property and constituting it a public road with all the incidents of municipal road control over municipal streets and highways, this contract with the municipality expressly stipulated—and it is the covenant of the municipality as well as the railroad—that "this contract shall not be construed as a dedication of said driveway as a public highway." In the face of this agreement, the city cannot, and Courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets.

Judgment.

Received and Filed March 26, 1926.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

October Term, 1925.

MAYOR AND BOARD OF ALDERMEN, Town of Morristown, N. J., Appellants, vs. DELA. LACKA. & WEST. R. R. Co., Appellee.	No. 3391 (List No. 45)

Appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here

ORDERED, ADJUDGED and DECREED by this Court, that the decree of the said District Court in this cause be, and the same is hereby reserved, with costs, with direction to the said District Court to dismiss the bill.

Philadelphia, March 26, 1926.

VICTOR B. WOOLLEY,
Circuit Judge.

Motion for Rehearing.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

October Term, 1925.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Complainant-Appellee,

vs.

THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN,
Defendant-Appellant.

#45 (3391).

MOTION FOR REHEARING.

Now comes the Delaware, Lackawanna and Western Railroad Company, Complainant-Appellee, and respectfully moves for a rehearing in the above-entitled cause, upon the following considerations.

We understand that the Court holds that the use of lands of the complainant, by persons having occasion to go to and from its railroad station, constitutes a "public" use, which renders that land subject to municipal regulation generally in the same manner and to the same extent as if the land was used or occupied by a public highway, and that the setting apart of a specified area of such land by a municipal ordinance as a stand for the parking or stationing of taxicabs, not owned or controlled by the railroad company, is merely an incident of such regulation, arising from the right or power of a municipality to regulate traffic on streets as a phase of the police power.

We acknowledge that these question of "public use" and the police power considered and applied by the Court, were not fully discussed by our brief and argument, and that the Court was therefore probably not aided in its consideration of them by our presentation of our case. We submit, however, in all deference, that the Court in rendering its judgment in this case has erred in two important particulars.

First, in failing to consider and give effect to certain fundamental principles, repeatedly announced by the Supreme Court of the United States, which underlie any occasion to apply the constitutional questions involved.

Second, in applying to this case, which involves service which the railroad company as a common carrier is not obliged to perform, those rules of law respecting regulations of service which a common carrier is obligated to furnish.

The principles which we believe the Court has overlooked are the following:

1. A railroad company's duties are limited in two ways: First, it owes no duty whatever to the general public, except to accept the individual members thereof as passengers and shippers *Wolff* v. *Industrial Relations Court,* 262 U. S. 522, 535; and it owes no duty to passengers and shippers, except to provide the transportation service specified by law or its charter.

2. The rights of the public or railroad users can rise no higher than the duties residing in the carrier.

Oregon etc., R. R. v. *Fairchild,* 224 U. S. 510.

3. The *general public* therefore has no rights whatever in or on the land of a railroad company.

Western Union Tel. Co., v. *Penn. R. R.*, 195 U. S. 540;
Donovan v. *Penna. Co.* (*supra*).

4. The only rights of *passengers and shippers* in or on the lands of a railroad company, are those that are inseparable from, and *essentially necessary to that transportation service which the carrier is compelled by law to provide.*

5. When a railroad company provides lands and buildings for the performance of its legal duties, there is no presumption or implication that they are subject to any use or devoted to any purpose *except the services required by law,* no matter how beneficial or convenient such other uses may be to the general public.

6. When governmental authority seeks to regulate the use of railroad land (except to abate a nuisance), it must first be determined whether the regulation relates to a service which the railroad company is legally obliged to provide.

7. *Taxicab service is not a part of its transportation, and a railroad company is therefore under no obligation to provide such service for its passengers, or any land or buildings necessary for that purpose.*

Thompson v. *Mount,* 91 N. J. Eq. 497;
Donovan v. *Penn. Co.,* 199 U. S. 276.

8. While the police power may authorize government to regulate the owner's use of his own premises, it cannot be invoked to justify the deprivation of his own possession and use, and bestowing it on another.

Penna. Coal Co. v. *Mahon,* 260 U. S. 393.

9. These considerations are preliminary to the consideration of the application of constitutional principles, stated in the majority opinion of the Court as follows:

> "It is a fundamental principle of law, recognized in both the state and federal constitutions, that private property may not be taken for public use, the only use for which it may be taken under any circumstances, without due process of law and just compensation. Neither may an owner be deprived of any of the essential attributes of his property without like process and compensation. Bill Posting Sign Company v. Atlantic City, 71 N. J. L. 72; Ignaciunas v. Risley, 90 N. J. L. 712; Pennsylvania Coal Company v. Mahon, 260 U. S. 393. The property of a railroad company is private property and entitled to constitutional protection just as any other private property. Spottiswoode v. Morris & Essex R. R. Co., 61 N. J. L. 322; Skaggs v. Kansas City Terminal Railway Co., 233 Fed. 827; Western Union Telegraph Company v. Pennsylvania Railroad Co., 195 U. S. 540."

With the foregoing fixed principles in mind, we think it will be apparent that the opinion of the state court in *Welsh* v. *Potts,* 98 N. J. L. 630, which was followed by this Court, was in error in holding as a matter of law that the act of the railroad company in providing the station driveway was devoting it to "public use" in the sense of a public highway, and that it was therefore subject to regulation as such, as that view is contrary to the judgments of the Supreme Court of the United States.

10. As an additional reason, we submit that the Court has erred in assuming, and holding, contrary

to the State law, that a municipality has power to regulate the business or services of a common carrier.

We, therefore, ask for a rehearing for an opportunity to present to the Court for its consideration the points we have outlined, as the investment in stations and station grounds in this country runs into millions of dollars, and the questions are of paramount importance to every railroad company and municipality in which there is a railroad station, and the issues should be decided with due consideration of the opinions of the Supreme Court with reference to the nature and burdens and immunities of railroad property in the light of the obligations of common carriers and the rights of the general public and railroad patrons therein.

We also respectfully ask the Court, if this motion is denied, to retain the mandate and record to enable us to file a petition in the Supreme Court for a writ of certiorari.

M. M. STALLMAN,
JOHN L. SEAGER,
Of Counsel with Complainant-Appellee.

I hereby certify that in my opinion the foregoing motion is well founded in point of law and that it is not interposed for the purpose of delay.

MAXIMILIAN M. STALLMAN,
Of Counsel with Complainant-Appellee.

Memorandum in Support of Motion.

In *Great Northern Railroad Company* v. *Minnesota*, 238 U. S. 340, the Court held that the railroad company could not be required under an asserted police power of the states, to furnish land and provide stock scales at stations for the accommodation of stock buyers, *even though the stock was intended to be shipped over the railroad's line and would constitute a great benefit and convenience to the community.* In the first cited case Mr. Justice McReynolds wrote:

> "Manifestly, if the order is enforced plaintiff-in-error's property will be taken. Whether this would be without due process of law depends upon the special circumstances. * * * A taking of railroad property under administrative regulation must be tested by considering whether * * * the taking was justified by the *public necessities which the carrier could lawfully be compelled to meet* * * *. The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.* The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt. * * * We think this was an arbitrary and unreasonable exercise of power. * * * *The demands which may be made upon a carrier are limited by its duty,* and the record shows that the required structure has no direct relation thereto. * * * *A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like the owners of private property, it may control its own affairs*" (citing Donovan v. Penna. Co., 199 U. S. 279).

In *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71, Chief Justice White paraphrased the foregoing opinion in the following language:

> "Coming to consider the contention of the railway that the order to put in the scales was repugnant to the 14th amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could be lawfully compelled to meet. Holding that, as *the duty of the railway was confined to furnishing appliances for its business of transportation,* and that a cattle scale was not of such character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, *however much the public might be benefited thereby.*"

In *Donovan* v. *Penna. Co.*, 199 U. S. 279, which does not seem to be cited in the Court's opinion, the Supreme Court said (p. 286):

> "Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties. * * * Necessarily the same principles apply in reference to the use of the company's station house and depot grounds; and they are held in the same right as are its roads, its locomotives and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use *to the extent necessary for the public*

objects intended to be accomplished by the construction and maintenance of the railroad.

It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property, as public convenience and its own interests may suggest. * * * Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects.

But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. * * * It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words, it is entitled to the protection of the constitution, and in the precise manner in which protection is given. * * * *For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easement or servitudes.*

It would seem to be clear that the Penna. Co. had the right * * * to erect and maintain a passenger station and depot buildings for the accommodation of passengers and shippers as

well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. * * * A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers. * * * The railroad company * * * had no contractural relations with the defendants and owed them as hackmen no duty to aid them in their special calling * * * ."

We can perceive no differentiation in the legal status of a station driveway and a station building. In *Donovan* v. *Pa. Co., supra,* the Court held that "the same principles apply in reference to the use of the company's station house and depot grounds." If one is "public" the other is likewise a public place, and if the police power of a municipality extends to establishing a public hack stand on a station driveway merely because that facility is a public convenience, there could be no argument against an ordinance adopted on the same ground establishing a news stand, barber shop, restaurant or other convenience in a railroad station, or establishing a trolley loop and station on the railroad land and compelling the railroad company to provide free space for strangers to operate those conveniences and yet if the opinion in *Welch* v. *Potts* is sound law, there is nothing in the Constitution that can stop a municipality in the asserted exercise of police power from adopting ordinances to that effect.

Further, inasmuch as taxicab service is no part of the railroads company's transportation, we re-

spectfully submit that this Court has misapplied the rule and authorities cited by it, as follows:

> "Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be '*juris privati*' only, and is 'affected with a public interest.' It then becomes subject to public regulation and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer." Munn v. Illinois, 94 U. S. 113; Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372; Producers Transportation Co. v. Railroad Commission, 251 U. S. 228.

The difficulty is that those cases deal exclusively with rates and with the regulation of services which the utility companies were obliged by law to furnish their patrons, and do not involve the use of land or the performance of duties foreign to their businesses.

We also respectfully submit that the language of the opinion in the Welsh case, adopted by this Court, that the railway company in providing a driveway practically dedicated it to public use and regulation, is in conflict with the decision of the Supreme Court in *Wolff* v. *Court of Industrial Relations*, 262 U. S. 522. Chief Justice Taft in that case says (p. 539):

> "To say that a business is clothed with public interest is not to determine what regulation may be permissible in view of the private rights

of the owner. * * * It is not a matter of legislative discretion solely. * * * To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner."

And referring particularly to *Munn* v. *Illinois*, 94 U. S. 113 (cited by this Court as authority for the ordinance), the Court points out that what was regulated was the *owner's* operation of the elevator, a business which *he had a right to discontinue when he chose.* "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. * * * The power of a legislature to compel continuity in a business can only arise where the obligations of continued service by the owner * * * is direct, and is assumed when the business is entered upon."

As the effect of the ordinance is manifestly to establish a taxicab business, which the company has not assumed as an obligation, and to compel the railroad company to become a partner to the extent of furnishing the land essential thereto, for the "parking of cabs awaiting fares," but over which the railroad company is given no management and no return, and has not the power to discontinue at its will, the inapplicability of the Munn and similar cases to the question here, and the consequent conflict with the judgments of the Supreme Court, seems to us to be manifest.

In *Weems Steamboat Co.* v. *Peoples' Steamboat Co.*, 214 U. S. 345, the complainant sought to enjoin the defendant from using complainant's wharf without its consent. The Circuit Court had held that while the wharf was private property it did not follow that it was private *quoad* the public, and that the public had the right to use the wharf

through the agency of the defendant steamboat company upon payment of proper charges and under proper and reasonable regulations as might be imposed either by law or by the owner of the property.

The Supreme Court on review held:

(a) That the case of *Munn* v. *Illinois* had no bearing on the question, as that case dealt not with the use of the property but with the rates charged for the use.

"But this is no such case. The legislature has passed no law regarding rates and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defendant."

(b) "The question of the right of the owner to exclude others from the use of private wharves on a navigable stream has been very recently decided by this court in Louisville, etc., R. R. v. West Coast Storage Co., 198 U. S. 483, and the right of such owner to exclude any and all other persons from the use of such wharves was affirmed. The owner was not, it was also said, compelled to use the wharf exclusively for his own business or throw it open for the use of everyone, and that he could not only use it himself and permit some others to use it, but might at the same time exclude others to whom he did not choose to grant such right.

"And so in regard to the use of a private wharf by the public with or without compensation to the owner, the public can obtain no adverse right against such owner by mere user. * * * Rights of the public must have been

obtained by an adverse user so as to take away from the owner ordinary rights of ownership."

Further, if the part of the opinion above quoted means that the land is subject to regulation because its owner is a common carrier, and that the ordinance must be regarded as securing the performance of a legal duty owing to the company's passengers, in other words, a regulation of transportation, we think the Court has overlooked the fact that it is not shown, or claimed, that the municipality is invested with such power by the Legislature of the State. This Court must take judicial notice of the State statutes (*Nagaski* v. *Coal Co.*, 225 Fed. 913), mentioned in our brief, which confers exclusive jurisdiction of the regulation of the services and property of a common carrier, upon an administrative body, to wit, the Board of Public Utility Commissioners (P. L. 1911, Chap. 195).

"Sec. I, 15. *The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, property rights, equipment, facilities and franchises.* * * * The term 'public utility' is hereby defined to include every * * * corporation * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any steam railroad * * *"

We cannot assume that this Court intends to hold that a municipality of New Jersey has jurisdiction and powers which the State has not granted to it, but which it has specifically conferred upon and vested in an agency of the legislature; but the intimation in the opinion that the ordinance is justified because the lands are those of a *common carrier* and therefore subject to municipal control

seems to assume a legal fact in conflict with the State law.

We also submit that the Court has apparently overlooked the fact that in exercising the police power, while the government may either curtail or control the use of premises by the owner by building codes, or zoning, smoke and nuisance ordinances and the like, there is no authority in the country which holds that a city can at the same time completely oust an owner of the possession and use of land and give the exclusive use to persons to whom the owner owes no duty.

While the majority opinion of the Court states the rule that under the Constitution an owner may not be deprived of any "essential attribute" of property, it fails to give effect to the authorities in which that phrase occurs, which are that:

> "The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened and destroyed. A law which forbids a certain use of property deprives it of an essential attribute. The result is in effect a proscription of its ownership." (Spann v. Dallas, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387; Ignaciunas v. Risley, 98 N. J. L. 712.)

In 6 R. C. L. Constitutional Law, Sec. 471, the rule is stated:

> "It is not necessary, in order to render a statute vulnerable from a constitutional viewpoint, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the free will of the owner. * * * He cannot be deprived of any of the essential attributes which belong to the right of property. Wher-

ever the operation and effect of a general regulation is to extinguish or destroy that which * * * is the property of any person * * * it is unconstitutional and void."

In *Great Northern R. R. Co.* v. *Minn.*, 238 U. S. 340, Mr. Justice McReynolds said: "Manifestly, if the order to install scales is complied with, *plaintiff's property will be taken.*"

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the judgment of Mr. Justice Butler in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, where he said (420) that:

> "The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation."

Therefore, as the railroad company is under no charter or statutory or common law duty to provide taxicab service, and as the ordinance in question deprives the owner of the use of its land and appropriates it to such alien service, there can be no question that this ordinance is exactly the sort of unauthorized action mentioned by Mr. Justice Holmes in *Mahon* v. *Penn. Coal Co.*, 260 U. S. 393, where he said:

> "The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tend-

ency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States. * * * It is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*"

The foregoing observation of an eminent jurist is distinctly at variance with the pious statement in *Ex parte Vance*, 62 S. W. 568, that

"it is presumed that the municipality which is entrusted with the safety and convenience of travelers, is the best judge of the conditions and environment, and that it will not act in an unjust or oppressive manner, but for the good of the community."

We think it will be apparent, when due consideration is given to the *nature and limitations of a railroad's obligations*, and the *tenure and possession of its lands* in connection with those obligations, *the limited invitation and grant implied in providing them*, as expressed by the opinions of the Supreme Court, that such lands are not subject to be aliened from its owner and turned over to strangers in the guise of a municipal regulation of public property for a purpose in which the owner has no interest.

These considerations we believe must lead to a different conception of the force and effect of the contract provisions. The Court in the majority opinion overlooked the provision that "this contract

shall not be construed as a dedication of said driveway as a public highway." The opinion states:

"The town contends that the railroad company authorized it to establish the cab stand by its contract of September 24, 1912. It provides: 'that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto.'

This provision authorized the town to do two things: To regulate foot and vehicular traffic about the station, station grounds, approaches and driveways; and to enforce the rules and regulations of the railroad company in respect to the traffic. In performing the first duty, the town was to make its own rules and laws in accordance with which it would regulate the traffic. In doing the second, it was simply to enforce the rules and regulations made by the company.

We would like to suggest to the Court that the present controversy illustrates the practical impossibility of carrying out the contract in accordance with the above construction or interpretation.

The right of the railroad company secured by this contract, to call upon the town to exercise its police powers to enforce its rules and regulations with respect to traffic, is a property right protected by the Constitution, as an element of the right of the company to use its property as it sees fit, while the judgment of the Court upholding the right of the town to establish a cab stand on the company's property in defiance of its desires is a destruction

of the company's right solemnly secured to it by this contract. Concededly there is no specific right of property given to the town by the contract, nor any specific right to set aside a definite portion of the land for a cab stand. The first attempt of the town to secure an adjudication of this clause was in an effort to prevent cabs from using this property. *Welch* v. *Potts*, 98 N. J. L. 630, and we submit that that opinion is not an authority for the town asserting such a property right as is necessarily involved in appropriating a definite area of valuable land for the use and occupation of cab drivers, a subject not mentioned in the contract.

Respectfully submitted,

M. M. STALLMAN,
JOHN L. SEAGER,
Of Counsel with Complainant-Appellee.

Denial of Petition.

Office of the Clerk.
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit.
Philadelphia.

September 3, 1926.

M. M. Stallman, Esq..
810 Broad Street,
Newark, N. J.

Dear Sir:

We write to advise you that our Court has denied the petition for rehearing in the case of the Mayor of Morristown, *et al.* v. D. L. & W. R. R. Co., No. 3391.

Our Mandate is now due to issue

Yours very truly,

WM P. ROWLAND,
Deputy Clerk.

Mandate.

(Issued Sept. 7, 1926.)

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the District of New Jersey.

GREETING:

WHEREAS, lately in the District Court of the United States for the District of New Jersey, before you or some of you, in a cause between The Mayor and Board of Aldermen of the Town of Morristown, *et al.*, (defendants below) appellants, and The Delaware, Lackawanna & Western Railroad Company (complainant below) appellee, a decree was entered in the said District Court on the first day of July, 1925, which decree is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And WHEREAS, in the term of October, in the year of our Lord one thousand nine hundred and twenty-five, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel;

Mandate.

ON CONSIDERATION WHEREOF, it is now here ORDERED, ADJUDGED and DECREED by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with direction to the said District Court to dismiss the bill; and that the said appellants, Mayor and Board of Aldermen, Town of Morristown, N. J., recover against the said appellee, Delaware, Lackawanna & Western Railroad Company, in the sum of Forty Nine Dollars and Fifty Cents ($49.50) for costs herein expended, and have execution therefor;

Philadelphia, March 26, 1926.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the seventh day of September, in the year of our Lord one thousand nine hundred and twenty-six.

Costs of Mayor & Board of Aldermen, Town of Morristown, N. J.

Clerk	$29.50
Printing Record	
Attorney	20.00
	$49.50

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit
Court of Appeals,
Third Circuit.

Certificate.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Complainants, vs. THE MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF MORRISTOWN, *et als.*, Defendants.	In Equity.

I, Saunders Lewis, Jr., Clerk of the Circuit Court of Appeals of the United States for the Third Circuit, do hereby certify that the foregoing is a correct and complete transcript of the record and proceedings of the said court in the above-entitled cause as the same remain of record in said court.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed at Philadelphia, in the Third Circuit, this 23rd day of November, in the year of our Lord, one thousand nine hundred and twenty-six, and of the Independence of the United States, one hundred and fiftieth.

SAUNDERS LEWIS, JR.,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 10, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926. No.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

VS.

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Delaware, Lackawanna and Western Railroad Company respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled action.

Statement of the Case.

The action was begun on October 30, 1924, in the District Court of the United States for the District of New Jersey by The Delaware, Lackawanna and Western Railroad Company, a railroad corporation of the Commonwealth of Pennsylvania and a common carrier of passengers, against the Town of Morristown, a municipal corporation of the State of New Jersey, and sixteen individual defendants, licensed taxicab owners and drivers of the Town. The relief sought was a decree enjoining the Town of Morristown from enforcing a municipal ordinance which established a public hack stand on the complainant's station grounds at Morristown, New Jersey, and prohibited the use of other parts of the station grounds by private cars or taxicabs (Record, p. 29), and enjoining the individual defendants from entering upon and using complainant's station grounds as a public hack stand.

Petitioner operates as lessee in perpetuity the railroad of The Morris and Essex Railroad Company. The lessor Company owns in fee simple and the petitioner as lessee occupies and uses as a common carrier of passengers the passenger station and station grounds at Morristown, New Jersey, hereinbefore mentioned (Record, pp. 358-359). It has not at any time dedicated these station grounds to public use or conveyed any interest therein to the defendant municipality.

In the year 1922 from 20 to 25 of the licensed taxicab drivers of the Town customarily drove into the station grounds in the evening to meet passengers coming from

New York (Record, p. 127). Competition between these men created conditions of noise and turmoil which the Railroad Company attempted to eliminate by granting an exclusive privilege of parking taxicabs and soliciting patronage on its premises to a single operator, Welsh, under regulations prescribed by the Railroad Company (Record, p. 22). The municipal authorities characterizing this action by the Railroad Company as creating a monopoly, and as unjust to the public hack men in depriving them of their livelihood (Record, pp. 114, 135) adopted an ordinance forbidding *all* taxicabmen from using the station grounds, thus preventing the Railroad Company's contractor from performing his contract. Welsh challenged the validity of that ordinance in the State Court, unsuccessfully (Record, p. 100), and upon the termination of that litigation, on October 22, 1924, the municipality adopted the ordinance here in question, providing among other things (Record, p. 28):

> *Section* 1. That part of the westerly side of the driveway on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad in Morristown * * * is hereby designated and established as an additional public hack stand.
>
> *Section* 2. No automobile or other vehicle either private or that which may be engaged in the transportation of passengers for hire, shall be parked or allowed to stand for a longer period than is necessary to take on or let off passengers, expressage or baggage * * *.
>
> *Section* 3. No automobile or other vehicle which may be engaged in the transportation of passengers

for hire shall be parked or allowed to stand along the curb or enclosed part of the easterly side of said driveway.

Purporting to act upon the authority of this ordinance, 16 or more taxicab owners and drivers entered the petitioner's station grounds and parked their cabs in the area specified in the ordinance, stood upon an adjacent platform and solicited the patronage of persons who had arrived on petitioner's trains and were walking toward the nearest public highway (Record, p. 137). Thereupon petitioner filed its bill in the District Court, alleging the invalidity of the ordinance as a taking of the Railroad Company's property for municipal purposes without compensation, and depriving the petitioner of its property, and the use and control thereof without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution (Record, p. 4). The defense (Record, pp. 34, 40) was, first, that the Railroad Company held its station grounds subject to regulation by municipal authority, and the convenience of the traveling public in having a public hack stand on the Railroad's premises was a sufficient ground for the exercise of the municipal power; and secondly, that the ordinance constituted a mere traffic regulation which the municipality had a right to enact and enforce by reason of a contract entered into between the Railroad Company and the Town in the year 1912. That contract (Record, p. 308), which dealt primarily with the subject of eliminating grade crossings, contained certain provisions relating to the construction of a new passenger station and approaches thereto. One of these provisions

(Record, p. 316) was to the effect that the Railroad Company would provide and construct an L-shaped driveway running through its station grounds from a public street called Morris Street to another street called Lackawanna Place (see Map—Record, p. 21). After describing said driveway the contract provided (Record, p. 316):

> "This contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided (Record, p. 317) as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

The District Court, after hearing, sustained the bill and on the 17th day of July, 1925, a decree was entered granting the prayers of the bill (Record, p. 56) enjoining the Town from establishing a hack stand and enjoining the individual defendants from using complainant's land for such purpose. The opinion of Bodine, *J.*, of the District Court is printed on page 47 of the Record. On appeal by the respondents to the Circuit Court of Appeals for the Third Circuit that Court on March 26, 1926, filed its decree reversing the judgment of the District Court and directing the dismissal of the bill of complaint (Record, p. 374). Judge Davis, with whom Judge Woolley

concurred, wrote the opinion (Record, p. 365). Judge Buffington filed a dissenting opinion (Record, p. 372).

The majority held that the lands of the Railroad Company were as matter of general law, not of a private nature but of such a public nature that a municipality could lawfully establish a public hack stand thereon as a matter of public convenience and in the interest of public welfare; that notwithstanding the agreement between the Town and the Railroad Company that said driveway should not be deemed a public way, the covenant authorizing the Town to exercise all necessary police power at the station for the regulation of traffic "and the enforcement of the rules and regulations of the Railroad Company with respect thereto" gave the municipality plenary authority to establish a public hack stand in the station yard even against the expressed objection of the Railroad Company.

Your petitioner immediately filed a motion for a rehearing in said cause (Record, p. 375), which was denied without memorandum on September 3, 1926 (Record, p. 392). This petition is filed under Section 240(*a*) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

1. Did Section 1 of the municipal ordinance of October 22, 1924, declaring part of petitioner's property a public hackstand, take petitioner's property without due process of law in violation of the Fourteenth Amendment?

2. Did Section 2 of the same ordinance forbidding private vehicles and taxicabs from parking on petitioner's property longer than a limited time take petitioner's property likewise in violation of the Fourteenth Amendment?

3. Did Section 3 of the same ordinance forbidding the use of part of petitioner's property for parking space for taxicabs take petitioner's property likewise in violation of the Fourteenth Amendment?

4. Did the contract of 1912 grant to the municipality the right to exclude the petitioner from use of its own land and to establish thereon a "public hack stand" against its express objection?

Reasons for the Petition.

The reasons for which this petition is presented are that the Circuit Court of Appeals has "decided a federal question in a way probably in conflict with applicable decisions of this Court" and that it has "decided an important question of general law in a way probably untenable or in conflict with the weight of authority" (Rule 35).

The decision of the Circuit Court of Appeals in this case is of far reaching importance. If it stands, it will be

determinative of the right of domain, use and regulation of all station yards purchased and held by common carriers of this country for the conduct of their business of transporting both passengers and freight. A matter of such importance should be settled by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit and submits its brief hereto attached in support of this petition.

Respectfully submitted,

JOHN W. DAVIS,
MAXIMILIAN M. STALLMAN.
JOHN L. SEAGER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1926. No.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

VS.

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

BRIEF IN SUPPORT.

POINT I.

The ordinance in question is repugnant to the Fourteenth Amendment of the Constitution of the United States because it takes petitioner's property without due process of law.

(*a*) THE ORDINANCE TAKES THE PROPERTY OF THE RAILROAD COMPANY WITHIN THE MEANING OF THE CONSTITUTION.

It is not necessary, in order to render the ordinance vulnerable to constitutional attack, that it must in terms or effect authorize an absolute conversion of property, so

long as it affects the free use and enjoyment of the property or the power of disposition at the will of the owner.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166;
Ignacunias v. *Risley*, 98 N. J. L. 712;
Penna. Coal Co. v. *Mahon*, 260 U. S. 393, 413.

In *Great Northern R. R. Co.* v. *Minn.*, 238 U. S. 340, 345, Mr. Justice McReynolds, in speaking of an order of a state commission directing a common carrier to install cattle scales, said: "Manifestly if the order to install is complied with plaintiff's property will be taken."

So in the case at hand while the municipality has not in terms deprived petitioner of the title to its lands, in establishing the hack stand thereon it has deprived petitioner of the right to use the land according to its own plans, purposes and requirements.

It has not condemned the property affected, nor has it provided any compensation to the owner.

(*b*) THE PROPERTY OF A RAILROAD COMPANY CANNOT BE TAKEN OR APPROPRIATED, UNDER THE GUISE OF REGULATION, EXCEPT FOR A PURPOSE WITHIN THE STATUTORY DUTIES OF THE CARRIER.

In *Great Northern Railroad Company* v. *Minnesota*, 238 U. S. 340, the police power of the State to regulate common carriers was invoked as a justification for an order directing the railroad company to install a scale for the use of stock buyers. In that case Mr. Justice McReynolds wrote (p. 345):

> "Manifestly, if the order is enforced, plaintiff-in-error's property will be taken. Whether this would

be without due process of law depends upon the special circumstances. * * * A taking of railroad property under administrative regulation must be tested by considering whether * * * the taking was justified by the *public necessities which the carrier could lawfully be compelled to meet* * * *. *The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.* The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt * * * We think this was an arbitrary and unreasonable exercise of power * * * *The demands which may be made upon a carrier are limited by its duty,* and the record shows that the required structure has no direct relation thereto * * * *A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like the owners of private property, it may control its own affairs"* (citing *Donovan* v. *Penna. Co.,* 199 U. S. 279). (Italics ours.)

Again in *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71, 72, Chief Justice White paraphrased the foregoing opinion in the following language:

"Coming to consider the contention of the railway that the order to put in the scales was repugnant to the 14th amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could be lawfully compelled to meet. Holding that, as *the duty of the railway was confined to fur-*

nishing appliances for its business of transportation, and that a cattle scale was not of such character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, *however much the public might be benefited thereby.*" (Italics ours.)

From the foregoing cases it is clear that the land of a railroad company cannot be appropriated for a use or a service which the carrier is not obligated by law to provide, nor for furnishing an appliance not part of its business of transportation.

(*c*) TAXICAB SERVICE IS NO PART OF THE BUSINESS OF PETITIONER AND IT CANNOT BE COMPELLED TO FURNISH LAND FOR A PUBLIC HACK STAND UNDER THE GUISE OF AN EXERCISE OF THE POLICE POWER.

It is not claimed in this case that the petitioner is engaged in the operation of taxicabs or that it is under any legal duty to provide such a service. Such service is not included in its filed tariff or in the price of tickets. Nevertheless, the effect of the ordinance in question is to require the petitioner to furnish a specified area of land as a station for the parking of cabs and as a place of business for the hackmen, and this at the sacrifice of a contract arranging adequately for such service. Two classes of individuals are involved, the hackmen, and their patrons who are expected to arrive on the company's trains. As to the passengers, we submit that the petitioner is under no obligation, and cannot be placed under an obligation, to furnish a large area of valuable land for the parking of public taxicabs.

When the railroad company furnishes the passenger with a driveway, by means of which his favorite or selected cab driver can drive up to and depart from the station door or platform, it has done all that can be legally expected or demanded in the way of affording him a safe and convenient exit from its premises. To go further, and require the railroad company to provide storage space for a large number of taxicabs, a "public hack stand," is in direct conflict with the principles announced by this Court in *Great Northern Railway Company* v. *Minnesota* and *Id.* v. *Cahill* (*supra*).

As to the cab drivers, they have no right to make use of the company's premises, and such a right cannot be conferred upon them by a municipal ordinance.

In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, this Court said (p. 286).

> "Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties * * * Necessarily the same principles apply in reference to the use of the company's station house and depot grounds; and they are held in the same right as are its roads, its locomotives and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use *to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad.* (Italics ours.)
>
> It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property as public convenience

and its own interests may suggest * * * Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects.

But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves * * * It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words, it is entitled to the protection of the constitution, and in the precise manner in which protection is given * * * *For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes.* (Italics ours.)

It would seem to be clear that the Penna. Co. had the right * * * to erect and maintain a passenger station and depot buildings for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers * * * A hackman, in nowise connected with the railroad company, cannot, of right

> and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers * * * The railroad company * * * had no contractual relations with the defendants and owed them as hackmen no duty to aid them in their special calling * * *."

In this regard, we can perceive no difference in the legal status of a station driveway and that of a station building. In *Donovan* v. *Pa. Co., supra,* the Court held that "the same principles apply in reference to the use of the company's station house and depot grounds." If one is "public" the other is likewise a public place, and if the police power of a municipality extends to establishing a public hack stand on a station driveway merely because that facility may be a public convenience, there could be no argument against an ordinance adopted on the same ground establishing a news stand, barber shop, restaurant or other convenience in a railroad station, or establishing a trolley loop and station on the railroad land, and compelling the railroad company to provide free space for strangers to operate those conveniences, and yet if the opinion below is sound, there is nothing in the Constitution that can stop a municipality in the exercise of the asserted police power from adopting ordinances to that effect.

In *Thompson's Express Co.* v. *Mount,* 91 N. J. Equity 497, the Court of Errors and Appeals, per Mr. Justice Swayze, said:

> "The question we have to decide is * * * whether the railroad company can give the complainant an exclusive right in a case where neither the com-

plainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude all except travelers. * * * Reason clearly answers in favor of the exclusion * * * the authorities above cited justify the exclusion on the ground that even where a public duty exists, the right of the railroad company to make reasonable regulation involves the right to protect itself from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of injury * * * A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. Our view has not only reason on its side but also the authority of the highest tribunal, which can pass upon the question of the equal protection of the laws."

The Court below seems to have disregarded the limitations upon the exercise of police power which we have hereinbefore discussed. It states in the prevailing opinion below (Record, p. 369):

"Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be '*juris privati*' only, and is 'affected with a public interest.' It then becomes subject to public regulation and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either

damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer." *Munn* v. *Illinois,* 94 U. S. 113; *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372; *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228.

The difficulty is that the cases cited deal exclusively with rates or with the regulation of those public services which the utility companies were obliged by law to furnish their patrons, and do not involve the use of land or the performance of duties foreign to their business. Nothing is said in any of them in support of taking land without paying for it, or in support of taking it and handing it over to individuals.

In *Wolff* v. *Court of Industrial Relations,* 262 U. S. 522, Chief Justice Taft, emphasizing this distinction between rate and other transportation service regulation and a general regulation of property, says (p. 539):

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner * * * It is not a matter of legislative discretion solely * * * To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. * * * This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention."

And referring particularly to *Munn* v. *Illinois,* the Court points out that what was regulated was the *owner's*

operation of the elevator, a business which *he had a right to discontinue when he chose.* "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. * * * The power of a legislature to compel continuity in a business can only arise when the obligation of continued service by the owner * * * is direct, and is assumed when the business is entered upon."

As the effect of the ordinance is manifestly to establish a taxicab business, which the company has not assumed as an obligation, and to compel the railroad company to become a partner to the extent of furnishing the land essential thereto, for the "parking of cabs awaiting fares," but over which the railroad company is given no management and no return, and has not the power to discontinue at its will, the inapplicability of the Munn and similar cases to the question here, and the consequent conflict with the judgments of the Supreme Court, seems to us to be manifest.

Along the same line is the statement in the opinion below that the Railroad Company, in providing a driveway practically dedicated it to public use and regulation. This is in conflict with the decision in *Donovan* v. *Pennsylvania Co., supra,* and other cases in the Supreme Court.

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the

judgment of Mr. Justice Butler in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, where he said (420) that:

> "The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation."

Therefore, as the railroad company is under no duty to provide taxicab service, and as the ordinance in question deprives the owner of the use of its land and appropriates it to such alien service, there can be no question that this ordinance is exactly the sort of unauthorized action mentioned by Mr. Justice Holmes in *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 415, where he said:

> "The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States. * * * It is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * **We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."**

The foregoing observation of an eminent jurist is distinctly at variance with the statement in *Ex parte Vance*, 62 S. W. 568, cited in the prevailing opinion in the Court below, that

> "it is presumed that the municipality which is entrusted with the safety and convenience of travelers is the best judge of the conditions and environment, and that it will not act in an unjust or oppressive manner, but for the good of the community."

(*d*) THE ORDINANCE CANNOT BE UPHELD AS SECURING THE PERFORMANCE OF A LEGAL DUTY OWING BY THE RAILROAD COMPANY TO ITS PASSENGERS—IN OTHER WORDS, AS A REGULATION OF TRANSPORTATION.

If the opinion of the Court below means that the land is subject to regulation because its owner is a common carrier, and that the ordinance must be regarded as securing the performance of a legal duty owing to the company's passengers—in other words, a regulation of transportation—we think the Court has overlooked the fact that it is not shown, or claimed, that the municipality is invested with such power by the legislature of the State. The Court must take judicial notice of the State statute (*Vagaszki* v. *Coal Co.*, 225 Fed. 913), which confers exclusive jurisdiction of the regulation of the services and property of a common carrier upon an administrative body, to wit, the Board of Public Utility Commissioners (P. L. New Jersey, 1911, Chap. 195).

> "Sec. I, 15. *The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, prop-*

erty rights, equipment, facilities and franchises. * * * The term 'public utility' is hereby defined to include every * * * corporation * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any steam railroad * * *" (Italics ours.)

We cannot assume that the Court intended to held that a municipality of New Jersey has jurisdiction and powers which the State has not granted to it, but which it has specifically conferred upon and vested in an agency of the legislature; but the intimation in the opinion that the ordinance is justified because the lands are those of a common carrier and therefore subject to municipal control seems to assume a legal fact in conflict with the State law.

POINT II.

The contract of September 24, 1912, cannot be construed as a grant of a public easement.

The pertinent provisions of the contract in question are as follows (Record, p. 315):

"The Railroad Companies shall also lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from Morris Street, between the Railroad Companies' proposed new passenger station grounds and the Railroad Companies' present freight house tracks, to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly

and southerly lines of the lands of the Railroad Companies. * * * The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for use of those now having rights of egress to Morris Street in Saw Mill Lane, **but this contract shall not be construed as a dedication of said driveway as a public highway.**"

"It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and **for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.**"

The petitioner relied in the District Court and in the Circuit Court of Appeals upon the clause in the contract reading:

> "This contract shall not be construed as a dedication of said driveway as a public highway."

As Judge Buffington states in his dissenting opinion, this is the covenant of the town as well as the railroad, and the municipality cannot, and the Courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets. *The majority opinion, however, does not mention or construe this clause,* and we sub-

mit that it is prejudicial error to fail to give effect to this plain language of the contract.

The other clause of the contract provides that the town shall exercise "all necessary police powers" at the station for the purpose of regulating traffic, and *for the enforcement of the rules and regulations of the railroad companies with respect thereto.*

The proofs show that for the purpose of protecting its passengers from the importunities of competing cabmen the railroad company attempted to regulate its station grounds by excluding all other cabmen from the premises and granting to one Welsh the exclusive privilege of conducting a taxicab business on its lands. This was the identical practice and regulation approved by this Court in *Donovan* v. *Pennsylvania Company,* 199 U. S. 279.

The petitioner contended in the courts below that the last-quoted clause of the contract meant what it says, that the town would "exercise all necessary police powers" for the enforcement of the rules and regulations of the railroad company in respect to traffic at the station; that is to say, the railroad company bargained for and obtained what it considered a means of protection to its passengers, its property and its operations. Manifestly there is nothing in the language employed to suggest that the railroad company intended to confer upon the town a right to regulate or use the station grounds in a manner directly contrary to its own desires and plans of operation, or to impair the effect of the preceding clause providing that the driveway should not be deemed a public way.

Conclusion.

The case presented is so concisely yet so completely stated by Judge Buffington in his dissenting opinion that we here print it in conclusion of our argument.

> "Under whatever form of words the matter may be stated, the simple fact is that the railroad's property has been taken from it without compensation and it is now denied possession of its own ground. In its agreement with the City it asserted its private ownership of this private road, so what has been now taken for public use, under the guise of public property, is in fact private property. Because the constitution forbids taking private property for public use without compensation, I record my dissent. What happened was that the railroad laid out and built a 'driveway and station ground approach'; it granted a public right of access to and from its station over such driveway in these words: 'Said driveway shall be kept open at all times for passengers, pedestrians * * * and general vehicular traffic to and from the station'; but far from surrendering its property and constituting it a public road, with all the incidents of municipal road control over municipal streets and highways, this contract with the municipality expressly stipulated—and it is the covenant of the municipality as well as the railroad—that 'this contract shall not be construed as a dedication of said driveway as a public highway.' In the face of this agreement the city cannot, and Court should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets" (Record, p. 372).

For the reasons stated your petitioner respectfully prays that a writ of certiorari issue to enable this Court to review the decision of the Circuit Court of Appeals.

Respectfully submitted.

JOHN W. DAVIS,
MAXIMILIAN M. STALLMAN.
JOHN L. SEAGER,
Attorneys for the Petitioner.

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IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN and OTHERS,
Respondents.

October Term 1927.
No. 147.

BRIEF FOR PETITIONER.

This cause comes before this Court upon Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit granted January 10, 1927.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 14 Fed. (2d) 257; that of the District Court is unreported, but appears at pages 47-55 of the Record.

Jurisdiction of the Court.

This Court has jurisdiction of the above entitled cause under United States Code, Title 28, Chapter 9, Section 347 (former Judicial Code § 240).

The judgment to be reviewed is dated March 26, 1926 (R. p. 374). It reversed the judgment of the District Court, District of New Jersey, and thereby sustained a municipal ordinance establishing a hackstand on petitioner's land and prohibiting the use of other parts thereof by private cars and taxicabs.

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

Statement of the Case.

The action was begun on October 30, 1924, in the District Court of the United States for the District of New Jersey by The Delaware, Lackawanna and Western Railroad Company, a railroad corporation of the Commonwealth of Pennsylvania and a common carrier of passengers, against the Town of Morristown, a municipal corporation of the State of New Jersey, and sixteen individual defendants, licensed taxicab owners and drivers of the town. The relief sought was a decree enjoining the Town of Morristown from enforcing a municipal ordinance which established a public hack stand on the complainant's station grounds at Morristown, New Jersey, and prohibited the use of other parts of the station grounds by private cars or taxicabs (R. p. 29), and enjoining the individual defendants from entering upon and using complainant's station grounds as a public hack stand.

Petitioner operates as lessee in perpetuity the railroad of The Morris and Essex Railroad Company. The lessor company owns in fee simple and the petitioner as lessee occupies and uses as a common carrier of passengers the passenger station and station grounds at Morristown, New Jersey, hereinbefore mentioned (R. pp. 358-359). The petitioner's lease was validated by an Act of the Legislature of the State of New Jersey, passed in 1869 (P. L. of N. J., p. 28). By force of this lease and the validating act, the title of The Morris and Essex Railroad Company to the premises in question became vested in the petitioner (See *United States Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. L. 254, at p. 261). It has not at any time dedicated these station grounds to public use (Brief opposing petition, p. 8) or conveyed any interest therein to the defendant municipality. Nor has the town condemned any part of the station grounds or any right therein (R. p. 68).

In the year 1922 from 20 to 25 of the licensed taxicab drivers of the town customarily drove into the station grounds in the evening to meet passengers coming from New York (R. p. 127). Competition between these men created conditions of noise and turmoil which the railroad company attempted to eliminate by granting an exclusive privilege of parking taxicabs and soliciting patronage on its premises to a single operator, Welsh, under regulations prescribed by the railroad company (R. p. 22). The municipal authorities declared that petitioner's action tended to create an objectionable monopoly, that it was unjust to the public cabmen and deprived them of their livelihood (R. pp. 114, 135) and that it was an interference

with the town in the management of the taxicab business within its limits and "an insult to the intelligence" of the Mayor and Aldermen (R. pp. 105 and 113). Thereafter, when, upon suit of petitioner, the New Jersey Chancery Court enjoined the respondent taxicabmen from coming upon petitioner's premises for the solicitation of business, the town authorities deliberately established a public taxicab stand "up traffic" from the post petitioner had allotted to its contractor (R. p. 166)—that is, in such a position that to approach the loading point at petitioner's station the public hackmen were compelled to meet the outgoing cabs of petitioner's contractor "head on". This, of course, produced confusion at the loading point (R. p. 199). Having produced this confusion the town then passed an ordinance *in form* prohibiting *all* taxicabmen from parking on petitioner's grounds (R. pp. 344-5-6) but under the circumstances *in fact* prohibiting *only petitioner's contractor,* since only he was then privileged to come upon the station property. The injunction in the New Jersey Chancery Court against respondent taxicabmen was then dissolved (R. 167, 168) as no longer needed to prevent the respondents from coming upon petitioner's property. Welsh, the petitioner's contractor, then challenged the ordinance prohibiting his performing his contract with petitioner, but was unsuccessful. Encouraged by this the town by the ordinance in question in the instant case then put the respondent taxicabmen *back where they originally were* before petitioner sought to end the noise and turmoil resulting from their boisterous competition for fares and, obviously only *to give color of good faith* to the whole series

of ordinances, at the same time forbade the use of other portions of the station property for the parking of the private cars of petitioner's patrons as well as for the parking of vehicles carrying passengers for hire. The text of the pertinent portions of the ordinance follows:

> *Section 1.* That part of the westerly side of the driveway on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad in Morristown, extending from the northerly side of the entrance way to the shelterhouse or tunnel under the depot northerly along the curb to the turn of said driveway under the railroad, is hereby designated and established as an additional public hack stand.
>
> *Section 2.* No automobile or other vehicle either private or that which may be engaged in the transportation of passengers for hire, shall be parked or allowed to stand for a longer period than is necessary to take on or let off passengers, expressage or baggage on that part of said westerly side of said driveway extending from the said northerly side of said entrance way southerly to Lackawanna Place.
>
> *Section 3.* No automobile or other vehicle which may be engaged in the transportation of passengers for hire shall be parked or allowed to stand along the curb or enclosed part of the easterly side of said driveway (R. pp. 28, 29).

Purporting to act upon the authority of this ordinance, 16 or more taxicab owners and drivers entered the petitioner's station grounds and parked their cabs in the area specified in the ordinance, stood upon an adjacent platform and solicited the patronage of persons who had arrived on

petitioner's trains and were walking toward the nearest public highway (R. p. 137). Thereupon petitioner filed its bill in the District Court, alleging the invalidity of the ordinance as a taking of the railroad company's property for municipal purposes without compensation, and depriving the petitioner of its property, and the use and control thereof without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution (R. p. 4). The defense (R. pp. 34, 40) was, first, that the railroad company held its station grounds subject to regulation by municipal authority, and the convenience of the traveling public in having a public hack stand on the railroad's premises was a sufficient ground for the exercise of the municipal power; and secondly, that the ordinance constituted a mere traffic regulation which the municipality had a right to enact and enforce by reason of a contract entered into between the railroad company and the town in the year 1912. That contract (R. p. 308), which dealt primarily with the subject of eliminating grade crossings, contained certain provisions relating to the construction of a new passenger station and approaches thereto. One of these provisions (R. p. 316) was to the effect that the railroad company would provide and construct an L-shaped driveway running through its station grounds from a public street called Morris Street to another street called Lackawanna Place (See map—R. p. 21) and would keep such new street open to traffic to and from the station grounds. After describing said driveway the contract provided (R. p. 316):

> "This contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided (R. p. 317) as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

The District Court, after hearing, sustained the bill and on the 17th day of July, 1925, a decree was entered granting the prayers of the bill (R. p. 56) enjoining the town from establishing a hack stand and enjoining the individual defendants from using complainant's land for such purpose. The opinion of Bodine, *J.* of the District Court, is printed on page 47 of the Record. On appeal by the respondents to the Circuit Court of Appeals for the Third Circuit that Court on March 26, 1926, filed its decree reversing the judgment of the District Court and directing the dismissal of the bill of complaint (R. p. 374). Judge Davis, with whom Judge Woolley concurred, wrote the opinion (R. p. 365). Judge Buffington filed a dissenting opinion (R. p. 372).

The majority held that the lands of the railroad company, while private property, had nevertheless, being railroad property, been devoted to a public use and had become so "affected with a public interest" that a municipality could lawfully establish a public hack stand thereon as a matter of public convenience and in the interest of public welfare; that notwithstanding the agreement between the town and the railroad company that said driveway should not be

deemed a public way, the covenant that the driveway should be kept open at all times for passengers, pedestrians and general vehicular traffic to and from the station grounds, and the covenant authorizing the town to exercise all necessary police power at the station for the regulation of traffic "and the enforcement of the rules and regulations of the railroad company with respect thereto" gave the municipality plenary authority to establish a public hack stand in the station yard even against the expressed objection of the railroad company.

Petitioner immediately filed a motion for a rehearing in said cause (R. p. 375), which was denied without memorandum on September 3, 1926 (R. p. 392). Thereupon petitioner applied to this Court under Section 240 Judicial Code as amended by the Act of February 13, 1925, for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals, which application was granted on January 10, 1927.

Points Upon which Petitioner Intends to Rely.

Petitioner urges that the Circuit Court of Appeals erred in reversing the judgment of the District Court and dismissing petitioner's bill, thereby in effect sustaining the municipal ordinance, because:

1. Section 1 of the municipal ordinance of October 22, 1924, declaring part of petitioner's property a public hackstand, and Section 2 of the same ordinance, forbidding private vehicles and taxicabs from parking

on petitioner's property longer than a limited time, and Section 3 of the same ordinance, forbidding the use of part of petitioner's property for parking space for private vehicles and taxicabs, take petitioner's property without due process of law in violation of the Fourteenth Amendment.

2. The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection.

Summary of the Argument.

All three sections of the ordinance here in question, if enforced, would take the petitioner's property within the meaning of the Fourteenth Amendment and, if without due process, would be unconstitutional. A railroad's property is private property and entitled to exactly the same protection under the Constitution as the property of any other private owner. Aside from those takings to which all private property is subject under the police power, no taking of railroad property can be justified unless for the meeting of some public need which the railroad, as a common carrier, has undertaken to meet. Under the decisions of this Court and under the local law of New Jersey, the furnishing of a public hack stand is no part of the railroad's public duty as a common carrier. As the ordinance would be unconstitutional as applied to the property of an individual and as the burden imposed is not within the scope of

the petitioner's public duty as a common carrier, the ordinance deprives the petitioner of its property without due process of law.

The only sense in which petitioner's property is devoted to public use is that it is devoted to the railroad business. As so devoted it is open only to the business visitors of the petitioner and not to the public generally. The railroad has never dedicated the property here in question to public use and has never granted to the Town of Morristown any interest in the property. Neither has the railroad granted to the town in gross the power to regulate the use of its station property or to appropriate a part thereof to the use of third parties with whom the petitioner has no business.

The ordinance here involved being an attempt to regulate the use of railroad property, the town is without jurisdiction in the premises under the law of New Jersey, which by express statute confers exclusive jurisdiction in the premises upon the State Board of Public Utility Commissioners.

ARGUMENT.

POINT I.

Sections 1, 2 and 3 of the ordinance in question are repugnant to the Fourteenth Amendment of the Constitution of the United States because they take petitioner's property without due process of law.

(a) The ordinance takes the property of the railroad company within the meaning of the constitution.

It is not necessary, in order to render the ordinance vulnerable to constitutional attack, that it must in terms or effect authorize an absolute conversion of property, so long as it affects the free use and enjoyment of the property or the power of disposition at the will of the owner.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166;
Penna Coal Co. v. *Mahon*, 260 U. S. 393, 413.

In *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340, 345, Mr. Justice McReynolds, in speaking of an order of a state commission directing a common carrier to install cattle scales, said: "Manifestly if the order to install is complied with plaintiff's property will be taken."

So in the case at hand, while the municipality has not in terms deprived petitioner of the title to its lands in establishing the hack stand thereon and in prohibiting the use of other parts of its property for parking space for private vehicles and taxi cabs, it has deprived petitioner of

the right to use the land according to its own plans, purposes and requirements.

It has not condemned the property affected, nor has it provided any compensation to the owner.

(b) The property of a railroad company cannot be taken or appropriated, under the guise of regulation, except for a purpose within the statutory duties of the carrier.

In *Great Northern Railway Company* v. *Minnesota*, 238 U. S. 340, the police power of the State to regulate common carriers was invoked as a justification for an order directing the railroad company to install a scale for the use of stock buyers. In that case Mr. Justice McReynolds wrote (p. 345):

> "Manifestly, if the order is enforced, plaintiff-in-error's property will be taken. Whether this would be without due process of law depends upon the special circumstances.
>
> * * * A taking of railroad property under administrative regulation must 'be tested by considering whether * * * the taking was justified by the *public necessities which the carrier could lawfully be compelled to meet*'.
>
> *The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.* The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt * * *. * * * we think this was an arbitrary and unreasonable exercise of power. * * * *The demands which may be made upon a carrier are limited by its duty*, and the present record

shows that the required structure has no direct relation thereto.

* * * *A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs*" (Citing *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279). (Italics ours.)

Again in *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71, 72, Chief Justice White paraphrased the foregoing opinion in the following language:

"Coming to consider the contention of the railway that the order to put in the scales was repugnant to the Fourteenth Amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet. Holding that, as *the duty of the railway was confined to furnishing appliances for its business of transportation* and that cattle scales were not of such character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, *however much the public might be benefited thereby*, * * *." (Italics ours.)

From the foregoing cases it is clear that the land of a railroad company cannot be appropriated for a use or a service which the carrier is not obligated by law to provide, nor for furnishing an appliance not part of its business of transportation.

(c) Taxicab service is no part of the business of petitioner and it cannot be compelled to furnish land for a public hack stand under the guise of an exercise of the police power.

It is not claimed in this case that the petitioner is engaged in the operation of taxicabs or that it is under any legal duty to provide such a service. Such service is not included in its filed tariff or in the price of tickets. Nevertheless, the effect of the ordinance in question is to require the petitioner to furnish a specified area of land as a station for the parking of cabs and as a place of business for the hackmen, and this at the sacrifice of a contract arranging adequately for such service. Two classes of individuals are involved, the hackmen, and their patrons who are expected to arrive on the company's trains. As to the passengers, we submit that the petitioner is under no obligation, and cannot be placed under an obligation, to furnish a large area of valuable land for the parking of public taxicabs. When the railroad company furnishes the passenger with a driveway, by means of which his favorite or selected cab driver can drive up to and depart from the station door or platform, it has done all that can be legally expected or demanded in the way of affording him a safe and convenient exit from its premises. To go further, and require the railroad company to provide storage space for a large number of taxicabs, a "public hack stand," is in direct conflict with the principles announced by this Court in *Great Northern Railway Company* v. *Minnesota* and *Id.* v. *Cahill* (*supra*).

As to the cab drivers, they have no right to make use of the company's premises, and such a right cannot be conferred upon them by a municipal ordinance.

In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, this Court said (pp. 292-296):

"Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties. * * * Necessarily, the same principles apply in reference to the use of the company's station house and depot grounds; for they are held in the same rights as are its road, its locomotives and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use *to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad* * * *. (Italics ours.)

It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property as public convenience and its interests may suggest, * * *. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; * * * subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. * * * But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. * * * In Western Union Tel. Co. *v.* Pennsylvania R. R. Co. *et al.*, 195 U. S. 540, the

court considered the nature of the interest which a railroad company had in its right of way. It was there said: 'A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given, * * * So, in Pittsburgh, Fort Wayne & Chicago Ry. Co. *v.* Bingham, Admx., 29 Ohio St. 364, 370, the Supreme Court of Ohio said that *'for all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes'*. (Italics ours.)

* * * it would seem to be clear that the Pennsylvania Company had the right * * * to erect and maintain a passenger station and depot buildings * * * for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers. * * * A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; * * *.

The railroad company * * * had no contractual relations with the defendants and owed them as hackmen no duty to aid them in their special calling"

In this regard, we can perceive no difference in the legal status of a station driveway and that of a station building. In *Donovan* v. *Pennsylvania Company, supra,* the Court held that "the same principles apply in reference to the use of the company's station house and depot grounds." If one is "public" and the other is likewise a public place, and if the police power of a municipality extends to establishing a public hack stand on a station driveway merely because that facility may be a public convenience, there could be no argument against an ordinance adopted on the same ground establishing a parcel room, restaurant or other similar convenience in a railroad station, or establishing a trolley loop and station on the railroad land, and compelling the railroad company to provide free space for strangers to operate those conveniences, and yet if the opinion below is sound, there is nothing in the Constitution that can stop a municipality in the exercise of the asserted police power from adopting ordinances to that effect.

In *Thompson's Express Co.* v. *Mount,* 91 N. J. Equity 497, dealing with the precise question, the Court of Errors and Appeals, per Mr. Justice Swayze, said (p. 498 *et seq.*):

> "The first act to require consideration is the Railroad act of 1903. Section 22 (*Comp. Stat. p. 4230*) enacts that any railroad company may erect a fence or other enclosure around its stations so as to prevent any persons other than passengers from coming near its trains and may exclude from such enclosures all persons except travelers. The act is in substance the same as the act of 1839 (*P. L. p. 170; Rev Stat. p. 594*) and antedates by ten years the charter of the Central railroad. That railroad has therefore always had the

right to exclude from its stations all persons except travelers, and the agents of the company. *The importance of the enactment* to the present purpose *is that it demonstrates, if demonstration were needed, that the legislature could not have meant to require railroads to transport passengers beyond their own stations,* for such transportation would require the entrance of others—hackmen and the like—to the station grounds. As the railroad business developed and towns increased in size a demand arose for cab and omnibus service. This was a kind of public service which the railroads might well provide for the better accommodation of the traveling public. Even if they were without authority to do so under their charters, the case would come within the ruling of the United States supreme court in *Jacksonville Railway Co.* v. *Hooper, 160 U. S. 514* * * *.

* * * "The question we have to decide is * * * whether the railroad company can give the complainant an exclusive right in a case where neither the complainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude all except travelers. Reason clearly answers in favor of the exclusion. The authorities above cited justify the exclusion on the ground that even where the public duty exists, the right of the railroad company to make reasonable regulations involves the right to protect itself and its passengers from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of

> injury. * * * A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. Our view has not only reason on its side but also the authority of the highest tribunal, which can pass upon the question of the equal protection of the laws." (Italics ours.)

There is nothing contrary to this in *Welsh* v. *Morristown,* 98 N. J. Law, 630. The court there had before it only the ordinance forbidding all taxicab men from coming upon the station grounds. The power of the town to establish a taxicab stand on petitioner's property against its will was not in issue, nor was the railroad company a party to the suit. Moreover, as will be more fully shown hereafter (p. 24), that decision went distinctly on the ground that petitioner had opened up its property to indiscriminate use by the public generally, whereas the courts below in the present case took no such position.

The court below seems to have disregarded the limitations upon the exercise of police power which we have hereinbefore discussed. It states in the prevailing opinion below (R. p. 369):

> "Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be '*juris privati*' only, and is 'affected with a public interest.' It then becomes subject to public regulation and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either

damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer."

And in support of this statement the court cites the following Supreme Court cases:

Munn v. *Illinois,* 94 U. S. 113;
Union Dry Goods Co. v. *Georgia Public Service Corporation,* 248 U. S. 372;
Producers Transportation Co. v. *Railroad Commission,* 251 U. S. 228.

The difficulty is that the cases cited deal exclusively with rates or with the regulation of those public services which the utility companies were obliged by law to furnish their patrons, and do not involve the use of land or the performance of duties foreign to their business. Nothing is said in any of them in support of taking land without paying for it, or in support of taking it and handing it over to individuals.

In *Wolff* v. *Court of Industrial Relations,* 262 U. S. 522, Chief Justice Taft, emphasizing this distinction between rate and other transportation service regulation and a general regulation of property, says (p. 539):

"To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. * * * It is not a matter of legislative discretion solely. * * * To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner.

> "* * * This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention."

And referring particularly to *Munn* v. *Illinois,* the court points out that what was regulated was the *owner's operation* of the elevator, a business which *he had a right to discontinue when he chose.* "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. * * * The power of a legislature to compel continuity in a business can only arise when the obligation of continued service by the owner * * * is direct, and is assumed when the business is entered upon."

When we consider that the effect of the ordinance is manifestly to establish a taxicab business, which the company has not assumed as an obligation, and to compel the railroad company to become a partner to the extent of furnishing the land essential thereto, for the "parking of cabs awaiting fares", but over which the railroad company is given no management and no return, and has not the power to discontinue at its will, the inapplicability of the *Munn* and similar cases to the question here, and the consequent conflict with the judgments of the Supreme Court, seem to us to be manifest.

Along the same line is the statement in the opinion below that the railroad company, in providing a driveway practically dedicated it to public use and regulation. This is in conflict with the decision in *Donovan* v. *Pennsylvania Co., supra.*

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the judgment of Mr. Justice Butler in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, where he said (p. 420) that:

> "The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation."

And there can be no question that this ordinance is the same sort of unauthorized action as is referred to by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, where he said:

> * * * "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> * * * it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * *We are in danger of forgetting that a strong public desire to improve the*

public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (Italics ours.)

The foregoing observation is distinctly at variance with the statement in *Ex parte Vance,* 62 S. W. 568, cited in the prevailing opinion in the court below, that

> "it is presumed that the municipality which is entrusted with the safety and convenience of travelers is the best judge of the conditions and environment, and that it will not act in an unjust or oppressive manner, but for the good of the community."

(d) The ordinance cannot be upheld as securing the performance of a legal duty owing by the railroad company to its passengers—in other words, as a regulation of transportation.

If the opinion of the court below means that the land is subject to regulation because its owner is a common carrier, and that the ordinance must be regarded as securing the performance of a legal duty owing to the company's passengers—in other words, a regulation of transportation—we think the court has overlooked the fact that it is not shown, or claimed, that the municipality is invested with such power by the legislature of the state. The court must take judicial notice of the state statute (*Vagaszki* v. *Coal Co.,* 225 Fed. 913), which confers exclusive jurisdiction of the regulation of the services and property of a common carrier upon an administrative body, to wit, the Board of Public Utility Commissioners (P. L. New Jersey, 1911, Chapter 195, Section 1).

> "15. *The Board shall have general superivision and regulation of, jurisdiction and control over all*

> *public utilities, and also over their property, property rights, equipment, facilities and franchises* * * *. The term 'public utility' is hereby defined to include every * * * corporation * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any steam railroad * * *". (Italics ours.)

There is nothing in *Welsh* v. *Morristown*, 98 N. J. Law, 630, that casts any doubt on the proposition that the town was without jurisdiction under the local law. From the following excerpts from the opinion in that case it appears that the New Jersey Court of Errors and Appeals thought that it was dealing with property over which the public generally had an easement to pass and repass—in other words, a public highway. Said the court at page 632:

> "The Town claims the right to enact this ordinance generally by virtue of its police power to regulate traffic in public places, * * * the contract declared that 'said driveway which is the subject of the ordinance shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane but this contract shall not be construed as a dedication of said driveway as a public highway.' *It thereby and otherwise appears that the driveway in question was and is devoted to public use,* although the fee thereof remained in the railroad company."

And again at page 633:

> "As we have pointed out, *the public generally had the right to use the driveway in question,* * * *."

And finally on page 634:

> "The prosecutor relies mainly on the case of *Thompson's Express Co.* v. *Mount,* 91 N. J. Eq. 497. But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, *upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway.*" (Italics ours.)

The courts below in the present case have not agreed with the New Jersey Court of Errors and Appeals that the driveway was open to use by the public generally. The District Court held specifically that the *locus in quo* was a private way open only to petitioner's business visitors and a certain other group of persons specified in the elevation contract. The Circuit Court of Appeals agreed that the driveway was private property but held that its devotion to the railroad business was such a public use as gave to the town power to enact the ordinances here in question—that is, exactly the same power that the town would have over a public highway.

It is petitioner's position (1) that the fact that its property is devoted to the railroad business, while giving to the state authorities greater powers than they would have over the property of an individual, yet gives them far lesser powers than they would have over a public highway and (2) that under the State law, the fact that the driveway here

in question is devoted to the railroad business vests jurisdiction to exercise whatever powers of regulation the Federal Constitution permits with the Board of Public Utilities Commissioners and not with the town.

We cannot assume that the court intended to hold that a municipality of New Jersey has jurisdiction and powers which the state has not granted to it, but which it has specifically conferred upon and vested in an agency of the legislature; but the intimation in the opinion that the ordinance is justified because the lands are those of a common carrier and therefore subject to municipal control seems to assume a legal fact in conflict with the state law.

POINT II.

The contract of 1912 did not operate to grant to or confer upon the municipality the right to exclude the petitioner from the use of its own land and to establish thereon a public hackstand against its express objection.

In the brief of the municipality filed in opposition to the granting of the writ herein, we find such passages as

> "* * * although it (the land upon which the driveway is located) may be private property in one sense it is nevertheless devoted to a public use * * *" (Brief, p. 13).

and

> "* * * the driveway physically runs into Lackawanna Place, *so that leaving out the question of boundary lines it is to all intents and purposes a street* * * *" (Brief, p. 12). (Italics ours.)

These statements simply ignore the important facts of boundary lines, termination of a public street and the beginning of private property as well as the specific provisions of the contract of 1912 that

> "this contract shall not be construed as a dedication of said driveway as a public highway."

They evade the question which goes to the foundation of the asserted municipal power—whether this land with which we are dealing is private, under the dominion of the owner, or public, under the dominion of the municipality and subject to such use as it may prescribe.

The record clearly shows the character of petitioner's tenure of its station grounds. It is conceded by stipulation (R. p. 359) that the lands in question upon which are located the driveways, parking areas, walks and platforms are owned in fee simple by the petitioner's lessor and are in petitioner's possession. The nature of petitioner's possession and title was stated by the Court of Errors and Appeals in *United States Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. L., pp. 254, 261, as follows:

> "By a lease dated December 10, 1868, the Morris and Essex Railroad Company demised to the Delaware, Lackawanna and Western Railroad Company its franchises, together with all lands, real estate, rights of way, and all its other property and rights of every kind, real, personal and mixed, with the hereditaments and appurtenances, for the full term of the continuance of its charter and all renewals thereof. This lease was validated by an act of the legislature passed in 1869. The terms of the lease and of the act of validation are set out in State Board of Assessors *v.* Morris

and Essex Railroad Co., 20 Vroom 193, 207, 211. By force of this lease and the validating act the title of the Morris and Essex Railroad Company to the premises in question became vested in the plaintiffs."

It is conceded that the town has not established any rights by legal proceedings (R. p. 368); that the driveway in question has not been dedicated to public use (P. 8, Brief opposing petition herein) and it claims no rights by prescription. Since, as we have shown, the lands of the railroad are private as between it and cab drivers and respondents cannot justify the ordinance as an exercise of the police power, the question therefore, is: Has petitioner granted to the municipality any rights in these premises inconsistent with its own dominion over them, and which authorize the municipality to formally and conclusively subject said lands to a definite public use. The municipality asserts such a right and power, basing its contention upon the provisions of a contract entered into by the petitioner and the respondent municipality on September 24, 1912. This contract dealt primarily with the subject of eliminating grade crossings. The provisions of it, upon which the town relies as the warrant for establishing a hackstand on the petitioner's land, and prohibiting the parking of private vehicles of the railroad company's passengers, are as follows (R. p. 316):

VI.

"The Railroad Companies shall lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from

> Morris Street * * * to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly and southerly lines of the lands of the railroad companies, * * * Said driveway shall be forty-eight (48) feet in width. * * * The railroad companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, *but this contract shall not be construed as a dedication of said driveway as a public highway.*" (Italics ours.)

Notwithstanding the express provision that "this contract should not be construed as a dedication of said driveway as a public highway", the municipal authorities assert that the language "said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad, and for the use of those *now* having rights of egress to Morris Street, in Saw Mill Lane" converts this land into a quasi public place, which should on that account be subject to regulation under the police powers of the municipality, and that the setting apart, taking and devotion of a portion of the property for the establishment thereon of a public hackstand, for cabmen to park their cabs and solicit business, is merely a phase of such regulation.

Such regulation, however, is appropriate only over a public highway and any intent to dedicate the driveway here in question is negatived by the express terms of the contract. It is well settled under New Jersey law that in the face of an express disclaimer of an intent to dedicate, mere sufferance by an owner of general public user of his premises is insufficient to establish a dedication.

Wood v. *Hurd,* 34 N. J. L. 87, 90, 91.

See also:

Irwin v. *Dixion,* 9 How. 10, 30;
McKey v. *Hyde Park,* 134 U. S. 84, 96;
Folkestone Corp. v. *Brockman* (1914), A. C. 338, 367.

Neither can it be contended that in promising to keep the driveway open for those groups of persons mentioned in the contract, the railroad, in effect, promised to keep it open for the use of the public generally. Such a construction would be strange, unnatural and in direct conflict with the intention of the parties as may be gathered from the context of the agreement.

A railroad corporation owes to its passengers a common law duty of providing and keeping open in good and safe condition, proper and convenient means of access to and egress from a station, particularly if the building, as in this case, does not abut immediately upon the public highway, and this provision of the contract in specifying ample means of access to the station, does no more than to recognize and express this well understood common law duty. The contract, however, not only expressly negatives the

notion that the driveway shall become a public highway, or shall be devoted to indiscriminate public use, but significantly limits the use thereof, to wit "to traffic to and from the station grounds on the easterly side of said railroad". No grant to the town or to the public of the use of these premises for a public hackstand can be found in this contract, except by twisting it into a meaning directly contrary to that ordinarily attaching to the words employed.

As Judge Buffington states in his dissenting opinion (R. p. 373), the covenant that

> "this contract shall not be construed as a dedication of said driveway as a public highway",

is the covenant of the town as well as the railroad, and the municipality cannot, and the courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets. *The majority opinion, however, does not mention or construe this clause,* and we submit that it is prejudicial error to fail to give effect to this plain language of the contract.

It is further insisted, however, that the town has some rights, the nature of which is somewhat vague, arising from the other phrase of the provision quoted, that the driveway shall be kept open "for the use of those *now* having rights of egress to Morris Street in Saw Mill Lane." It appears from the evidence that Saw Mill Lane was a way extending from Morris Street to some point easterly of the railroad. Article V of the contract provided:

> "The Town shall vacate Saw Mill Lane from its intersection with Morris Street to the northerly ter-

minus, *or so much thereof between said points as now exists as a public street or highway of said Town*" (R. p. 315). (Italics ours.)

From this language it appears that when the contract was made, the parties were in doubt as to how much of Saw Mill Lane from its intersection with Morris Street to the northerly terminus did exist as a public highway. Subsequently this strip or way, which was privately owned, was conveyed to petitioner's lessor in two parcels, one lying north and one lying south, of the main tracks (R. p. 360). However, under and pursuant to this article of the contract, Saw Mill Lane from its intersection with Morris Street to the northerly terminus, which apparently embraces the whole extent of the lane, ("or so much thereof between said points as now exists as a public street") was vacated and all public rights therein extinguished (R. pp. 291, 292).

And so the language of Article VI, which mentions the use of the driveway by those "*now* having right of egress to Morris Street in Saw Mill Lane" imports *not a public use, but a private right in a private way.*

It is true that the State Court in *Welsh* v. *Morristown, supra,* took a contrary position. But it is submitted that the District Court (R. p. 51) rightly disregarded that case as not being the law of New Jersey on the facts here shown.

The court in the *Welsh* case held that the driveway was open to use "by the public generally" "although the fee thereof remained in the railroad company." It is the law of New Jersey established by a long uninterrupted line of decisions that in a case of the dedication of land as a

public highway, the fee remains in the dedicator and may be aliened by him. The land is merely opened to public user—an easement is created in favor of the public.

Dummer v. *Board of Selectmen,* 20 N. J. Law, 86;
Trustees of the Methodist Episcopal Church v. *Hoboken,* 33 N. J. Law, 13;
Pennsylvania Railroad Company v. *Ayres,* 50 N. J. Law, 660;
Van Duyne v. *Knox Hat Manufacturing Company,* 71 N. J. Equity, 375;
Tweddell v. *South Orange,* 112 Atlantic, 511.

This is precisely the effect that the court in the *Welsh* case gave to the elevation contract and the control over the driveway which it accorded to the town was identical with that which the town would exercise over a public highway. This was pointed out both by Judge Bodine in the District Court (R. p. 51), and by Judge Buffington in his decision in the Circuit Court of Appeals (R. p. 373).

Therefore the effect of the holding in the *Welsh* case was to read completely out of the contract the covenant that

> "* * * this contract shall not be construed as a dedication of the said driveway as a public highway."

Such disregard of an essential covenant of a contract is not in accordance with the law of New Jersey, or, in fact, of any other jurisdiction.

A further contention of the town rests upon a paragraph in Article VII of the contract (R. p. 317), as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the

station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, *and for the enforcement of the rules and regulations of the railroad companies in respect thereto.*" (Italics ours.)

It is submitted that this passage is plain and unambiguous in meaning if it be taken as a whole and that it leaves no room for any construction by the court. Taken in isolation, the words "police powers" might denote either the legislative power of the state to act to promote the public welfare or the obligation of patrolling the "station, station grounds, approaches and driveways." Taken in the context of the contract, there is no doubt that the expression means the latter and the latter only. It is stated that "the town may and shall exercise all necessary police powers *in and upon* the station," etc. The prepositions "in and upon" express location and not subject matter. The natural expression to denote subject matter would have been "in reference to" or "over". The real subject matter is indicated by the subsequent words "for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto." It is clear that the words "in and upon the station, station grounds, approaches and driveways" express the place where the powers are to be exercised. *The words would be without sense if applied to the legislative power of the state.* The "police powers" that the town was to exercise "in and upon" the station grounds, approaches, etc., was the obligation of maintaining police officers on the property for the direction of foot and

vehicular traffic at the station and so far as this was to be in accordance with "rules and regulations" and not in accordance with the exigencies of the moment, it was, by the express terms of the contract, to be in accordance with the "rules and regulations of the railroad company in respect thereto." This is the language that cannot escape attention.

As this part of the contract cannot be ignored or expunged, it must be given effect, and the only effect which can be given to it is that the railroad company contemplated, and provided for, the promulgation of rules and regulations governing both foot and vehicular traffic at said station; that such rules and regulations should be enforced, and that the town obligated itself to exercise all necessary police power for the enforcement of the rules and regulations made by the railroad company for the purpose of regulating such foot and vehicular traffic. It is significant that no mention is made of any rules or regulations to be made by the town; nevertheless the contention on the part of the town is, as we understand it, that it acquired the right under this provision to regulate traffic on the petitioner's lands according to its own discretion, irrespective of the wishes or desires of the railroad company, and that the provision for the enforcement of the rules and regulations of the railroad companies has and should be given no effect whatever (See testimony of Mayor Potts, R. p. 230). It is a startling proposition that any part of a contract solemnly entered into can be bodily and unceremoniously thrown out and disregarded. Manifestly this contention cannot be upheld. To adopt and sanction the construction contended for by the municipality would permit the town to determine the particular door or doors through which a passenger could enter or

leave the station. It could absolutely prohibit a passenger from entering the station grounds with his automobile or other vehicle. No construction permitting such absurdities would be permitted by any court. But in any event nothing in this provision can be construed as a grant by the petitioner to the municipality of any portion of its lands for the establishment thereon of a public stand where private hackmen, pursuing their own vocation, should have a place for the transaction of their private business affairs, or that the railroad company intended, after laying out extensive grounds for the use of its patrons, that the town should have the right to prevent such use. The map annexed to the bill shows that the petitioner's station grounds are elaborate and commodious, and were evidently designed for the accommodation of the vehicles belonging to the patrons of the railroad company, a facility especially required in a residential town like Morristown. The contract very clearly indicates that the railroad company contemplated that this system of driveways would necessitate some regulation of its use, and while it is provided that the laying out of the driveways should not be construed as a dedication to public use, it also expressly provided for the enforcement of its own rules and regulations with respect to foot and vehicular traffic by the aid of the police powers of the town. This provision obviously secures to the railroad company a right to service from the city police force which it might not otherwise have, but it certainly does not import a surrender of any rights which it then had as the owner of these premises.

Lastly, it is insisted that the right claimed by the town to set aside a certain portion of the station grounds for the

purpose of a public hackstand arises from a practical construction of the contract by the acts of the parties to it. The only facts presented in support of this claim are that after the construction of the station layout in 1914, the cabmen used the station grounds without objection on the part of the railroad company, which is admitted; that on one or two occasions the chief of police (R. p. 241), acting on verbal instructions from the mayor (R. p. 337), issued verbal orders to the cabmen with respect to their activities, and that at different times of the day town policemen visited the station. It is admitted, however, that the instructions to the chief of police, or his orders to the cabmen, were never communicated to or brought to the attention of any responsible official of the railroad company (R. p. 157). Neither is it contended that, at any time since the station was built, there had been any communication or arrangement between the town authorities and the railroad authorities with reference to police control or surveillance of the taxicab men.

The whole sum and substance of the matter is, that until the objectionable conduct of the taxicab men (R. pp. 81, 83, 85, 87, 96, 125) and the poor condition of their cabs (R. p. 124) brought about this controversy, the cabmen used the station grounds, and the railroad company passively permitted it, without the assertion of any right on one side or objection on the other, but neither the establishment of a public hackstand by formal municipal authority, nor the exclusion of the railroad company's patrons from any part of the station grounds, has any history or precedent as a basis for the present contention that those burdens were imposed upon the railroad company's lands by a practical construc-

tion of the contract. On the other hand, the petitioner, by excluding all independent cabmen and contracting for a taxicab service under its own supervision, effectually established a "regulation" of its station grounds (*Thompson* v. *Mount*, 91 N. J. Eq. 497), which was the first formal and definite action taken by any one with respect to the situation. The petitioner followed this action by obtaining a preliminary injunction from the Court of Chancery of New Jersey, restraining the independent cabmen from continuing the use of its premises (R. p. 166). The situation then was that the railroad company's contractor was the only taxicab operator in use of its premises. Nevertheless the town then proceeded to adopt an ordinance (R. p. 346) *forbidding all taxicabs from using the station grounds*, having just the opposite effect of the ordinance under review. Aside from the fact that the only purpose of the first ordinance was to prevent the company's contractor from performing his contract, it shows that the town has not, as a practical construction of the contract, consistently insisted upon the maintenance of a hackstand on the railroad company's land, but that its first formal action was to abolish whatever existed as a hackstand on the premises.

Conclusion.

The case presented is so concisely yet so completely stated by Judge Buffington in his dissenting opinion that we here print it in conclusion of our argument.

> "Under whatever form of words the matter may be stated, the simple fact is that the railroad's prop-

erty has been taken from it without compensation and it is now denied possession of its own ground. In its agreement with the city it asserted its private ownership of this private road, so what has been now taken for public use, under the guise of public property, is in fact private property. Because the constitution forbids taking private property for public use without compensation, I record my dissent. What happened was that the railroad laid out and built a 'driveway and station ground approach'; it granted a public right of access to and from its station over such driveway in these words: 'Said driveway shall be kept open at all times for passengers, pedestrians * * * and general vehicular traffic to and from the station'; but far from surrendering its property and constituting it a public road, with all the incidents of municipal road control over municipal streets and highways, this contract with the municipality expressly stipulated—and it is the covenant of the municipality as well as the railroad—that 'this contract shall not be construed as a dedication of said driveway as a public highway.' In the face of this agreement the city cannot, and Courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets" (R. p. 372).

We respectfully submit that for the reasons herein stated the judgment of the Circuit Court of Appeals should be reversed.

JOHN W. DAVIS,
MAXIMILIAN M. STALLMAN,
Counsel for Petitioner.

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JAN 18 1928

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 147.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

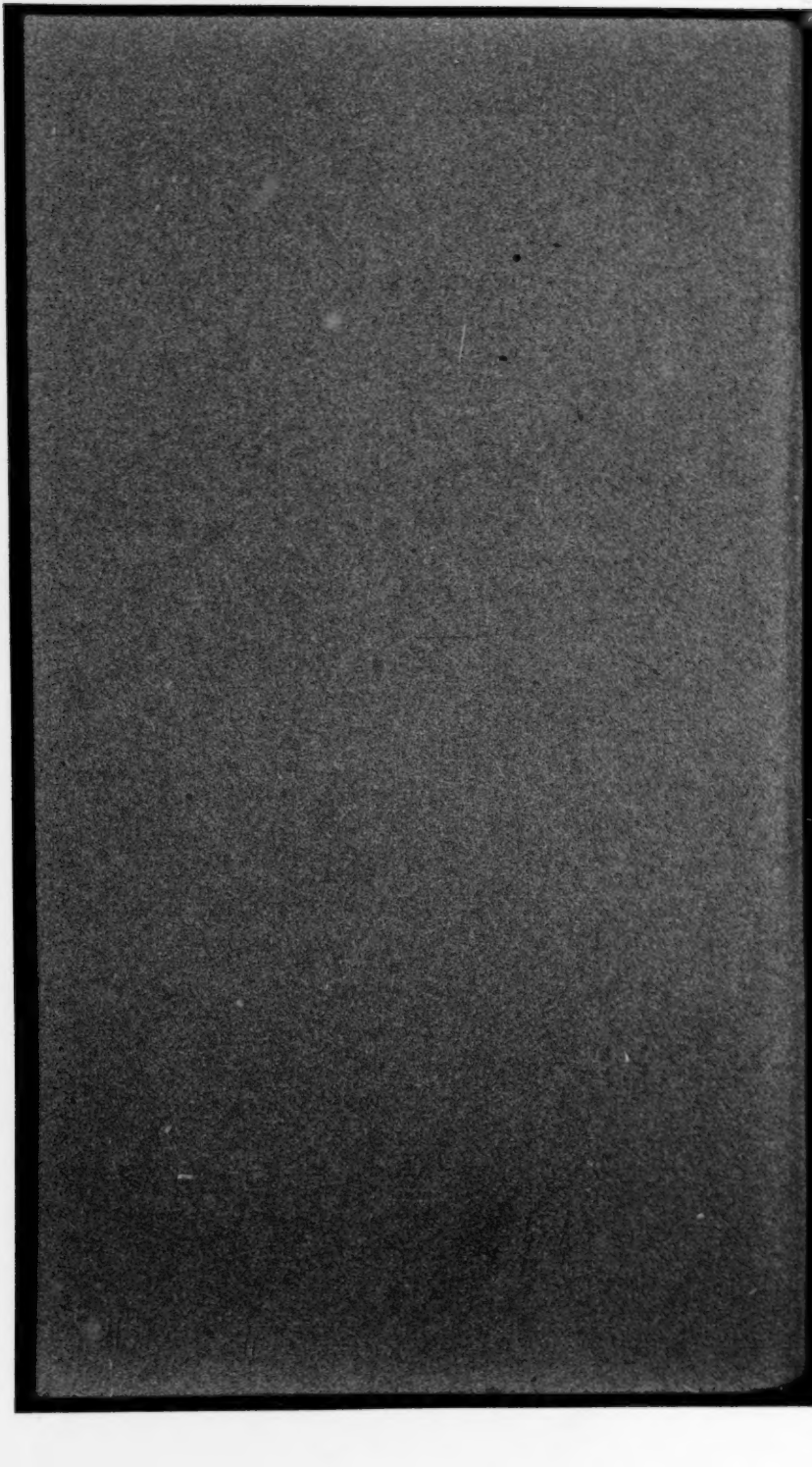
vs.

THE TOWN OF MORRISTOWN, HENRY LADEN AND OTHERS,

Respondents.

SUPPLEMENT TO BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

CONOVER ENGLISH,
H. C. TOMS,
Counsel for Respondent,
THE TOWN OF MORRISTOWN.



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October Term, 1927.
No. 147.

SUPPLEMENT TO BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

This supplement is filed by direction of some of the Justices at the argument.

The New Jersey Law Relating to the Dedication of Streets and Highways.

Our contention in our main brief was (Brief, p. 36) that the fact that the Railroad had never dedicated the land in the driveway in the strict legal sense of the word "dedicate", did not militate against the authority of the Town both under its police powers and under the contract to regulate traffic in the driveway.

Mr. Justice Brandeis requested that we furnish the court with a citation of the New Jersey cases showing the law of New Jersey with respect to the dedication of a highway.

In *Block* v. *Central Railroad Co.*, 85 N. J. Law 197, the word "dedication" is defined by the Court of Errors and Appeals as (p. 202),

> "the permanent devotion of private property to a use that concerns the public in its municipal character."

In *Dummer ads Board of Selectmen,* 20 N. J. Law 86, the Court said, page 107:

> "No particular *form* of dedication is necessary, 6 *Peters,* 440, nor is it essential to the validity of a dedication, that the land shall be in the actual use or occupation of the public."

In *Trustees of M. E. Church* v. *Hoboken,* 33 N. J. Law 13, the Supreme Court, by Justice (afterwards Chief Justice) Depue, said (p. 18):

> "But where the right of the public to the use of lands rests upon no other foundation than a dedication to public uses, the cases uniformly hold that the easement is vested in the public. A dedication to public uses does not require the existence of a corporation to whom it is made, or in whom it—the title—should vest. It may be valid without any specific grantee *in esse* at the time, to whom the fee could be granted. And in this respect it forms an exception to the general rule of transferring or creating an interest in lands, as it may be done without a deed, and without any person competent to accept the grant as grantee. The public is an ever existing grantee, capable of taking a dedication for public uses. *Wash. on Easements* 128.
>
> In fact it is the essence of a dedication to public uses that it shall be for the use of the public at large. There may be a dedication of lands for special uses, but it must be for the benefit of the public, and not for any particular part of it. *Wash. on Easements* 135; *Munson* v. *Hungerford,* 6 Barb. 265; *Curtis* v. *Kessler,* 14 Barb. 512; *Talmadge* v. *East River Bank,* 26 N. Y. 105. There may be a dedication of a way for a limited purpose, as for a foot way, but there cannot be a dedication to a limited part of the public, as to a parish. *Poole* v. *Husk-*

inson, 11 M. & W. 827; *Vestry of Bermondsly* v. *Brown,* L. R. 1 Eq. Cases 204.

There can be no dedication, properly speaking, to private uses. A private way cannot be created by dedication. *Wash. on Easements* 129; *Hale* v. *McLeod,* 2 Metcalf (Ky.) 98; *Com.* v. *Low,* 3 Pick. 413, per Morton, *J.*"

In order for property to be dedicated to public use under the law of New Jersey there must be a dedication by the land-owner and an acceptance by the municipality.

In *Schmidt* v. *Spaeth,* 82 N. J. Law, 575, the Court of Errors and Apeals said, page 578:

"But the dedication of land for the purpose of a public highway does not, *ipso facto,* create such a highway. There must be not only a dedication by the owner for that purpose, but an acceptance of that dedication by the public, in order to create it. *Holmes* v. *Jersey City,* 1 Beas. 309; *Pope* v. *Town of Union,* 3 C. E. Gr. 283; *Attorney-General* v. *Morris and Essex Railroad Co.* 4 *Id.* 391; *Booraem* v. *North Hudson County Railway Co.,* 12 Stew. Eq. 467; S. C., on appeal, 13 *Id.* 563; *New York and Long Branch Railroad Co.* v. *South Amboy,* 28 Vroom 258, 259. Such acceptance may be indicated by formal action on the part of the representatives of the public having authority over highways, or by public user of the dedicated land. *Booraem* v. *North Hudson County Railway Co.,* 13 Stew. Eq. 563; *Abbott* v. *Cottage City,* 143 Mass. 525; *Ell. S. & Roads* (ed. 1890) 114."

A very common method of dedication is where the owner of lands makes sales of lots with reference to a filed map.

Thus in *Hohokus* v. *Erie Railroad Co.,* 65 N. J. Law, 363, the New Jersey Supreme Court by Chief Justice Depue said, page 358:

"Where the owner of lands procures them to be laid off in blocks, streets and squares, and has a map made on which are delineated such streets and squares, which is filed among the public records of the county and by which he makes sales of lots, the streets and squares

laid down on the map become dedicated to public use. *Methodist Episcopal Church* v. *Hoboken,* 4 Vroom 13. Where the map is not made by the grantor, but he makes conveyances by reference to a city map, in which the land is laid off in streets, avenues and alleys intersecting it, he thereby adopts the map by sales with reference thereto, and his acts will amount to a dedication of the streets, avenues and alleys to the public. *Clark* v. *City of Elizabeth,* 11 *Id.* 172. The right of the several grantees to streets and avenues laid down on the map by reference to which the conveyances were made does not depend upon the fact that the map was made by the grantor. Such a right arises by force of the deeds by which the lots are conveyed."

So in *Clark* v. *Elizabeth,* 40 N. J. Law, 172, the Court of Errors and Appeals said, page 174:

"It is a general rule that where the owner of urban property, who has laid it off in lots, with streets, avenues and alleys intersecting it, sells his lots with reference to a plot on which the property is so laid off, or where, there being a city map on which the land is so laid off, he adopts that map, by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public. *Angell on Highways,* § 149; *Trustees, &c.* v. *Hoboken,* 4 Vroom 13."

Where a land-owner has dedicated land to the public he loses all power of retraction even though the municipality has not yet accepted the dedication of the land.

In *Hohokus* v. *Erie R. R. Co.,* 65 N. J. Law, 353, the New Jersey Supreme Court said, page 362:

"An acceptance by the public authorities is not essential to conclude the owner from the power of retraction, when his intention to permanently abandon his property and dedicate it to public uses is once unequivocally manifested. In that event the right of the public to appropriate the lands to the public use, at any future time when their wants or convenience require it, immediately attaches. *Trustees of M. E. Church* v. *Hoboken,* 4 Vroom

13, 14; *Den* v. *Dummer, Spenc.* 86; *Mayor of Jersey City* v. *Morris Canal and Banking Co.*, 1 Beas. 547. The local municipal government within the limits of which the dedicated lands lie, by virtue of their representing the public, may maintain actions to vindicate the public right of possession. *Price* v. *Inhabitants of Plainfield*, 11 Vroom 608; *Hoboken Land and Improvement Co.* v. *Hoboken*, 7 *Id.* 540."

In *Darling* v. *Mayor, &c. of Jersey City*, 73 N. J. Eq. 318, the court said, page 322:

"I understand the law to be that a tender of a dedication cannot be revoked (*Hohokus* v. *Erie Railroad*, 65 N. J. Law (36 Vr.) 353); that it may be accepted by the municipality at any time, but that until the tender has been accepted and the dedication has ripened into a public right and a public obligation the fee-simple title and the control of the property remain in the dedicator and he may use it as he will, provided he does not in any way interfere with the right of the public to accept the dedication whenever it sees fit to do so. *DeGroot* v. *Jersey City*, 55 N. J. Law (26 Vr.) 120; *Pease* v. *Traction Company*, 69 N. J. Law (40 Vr.) 165."

In *McAndrews & Forbes Co.* v. *Camden*, 78 N. J. Eq. 244, the Court of Errors and Appeals said, page 248:

"The public right to appropriate the street thus dedicated, at any time when their wants or convenience required it, could not be defeated or impaired by any subsequent act of the dedicator, or those claiming under it. The land could only be released from the public servitude by the state itself. *South Amboy* v. *New York and Long Branch Railroad Co.*, 66 N. J. Law (37 Vr.) 623."

In *Ridgefield Park* v. *N. Y. S. & W. R. R. Co.*, 85 N. J. Law, 278, the Court of Errors and Appeals said, page 281:

"when a street has once been dedicated, the right of the public to appropriate it to their use at any time when their wants or conveniences require it, cannot be de-

feated by any subsequent act of the dedicator or of those claiming under him. *McAndrews & Forbes Co.* v. *Camden, supra, Freeholders* v. *Sharpless,* 54 Vroom 443."

In *South Amboy* v. *New York, &c. Railroad Co.,* 66 N. J. Law, 623, the Court of Errors and Appeals said, page 625:

"Neither the lapse of time nor the act of the municipal government can impair the public right to take possession of a dedicated street. The legislature alone has the power to release the dedicated lands and discharge the public servitude."

In *United N. J. R. & C. Co.* v. *Crucible Steel Co.,* 85 N. J. Equity 7, affirmed on opinion 86 N. J. Equity 258, the Court said (85 N. J. Equity, at p. 27):

"Where an owner has dedicated a street over his lands, he is estopped from retracting his dedication, and the public right at any time to appropriate the street dedicated, when required, can only be released by the legislature, or the municipality under its authority. *Hoboken Land and Improvement Co. (Court of Errors and Appeals, 1873),* 36 N. J. Law 540, 549; *McAndrews &c. Co.* v. *Camden (Court of Errors and Appeals, 1910),* 78 N. J. Eq. 244, 248."

When land has been dedicated by the owner for a public highway it must be accepted as such by the municipality in order to complete the dedication.

In *Arnold* v. *City of Orange,* 73 N. J. Eq. 280, the Court said, page 281:

"* * * a mere dedication without acceptance is insufficient to charge the dedicated land with a public use and with public liability. Mr. Justice Lippincott, in *New York and Long Branch Railroad Co.* v. *South Amboy,* 57 N. J. Law (28 Vr.) 252, says:

'Whilst the fact of dedication may be clear as against the owner or those claiming under him, yet there must exist on the part of the public a ratification or accept-

ance evidenced by some authorized formal municipal act or a public user. The public acquired no rights, nor is it subject to any burdens by reason of the dedication unless it be by some formal act of acceptance or by unequivocal public user.' *Trustees* v. *Hoboken*, 33 N. J. Law (4 Vr.) 13; *Holmes* v. *Jersey City*, 12 N. J. Eq. (1 Beas.) 299; *Booraem* v. *North Hudson Railroad Co.*, 39 N. J. Eq. (12 Stew.) 465."

In *Schmidt* v. *Spaeth*, 86 N. J. Law, 179, the Court of Errors & Appeals said, page 182:

"As we pointed out in our earlier consideration of this case, formal action on the part of such a body, indicating a present intention to accept a dedication of land as a public highway, renders it such. By 'formal action' is not meant the passing of a formal resolution by the terms of which the dedication is accepted, but such action as conclusively shows an intention to presently treat the dedicated land as an existing public way. For instance, the bringing of an action of ejectment by the municipal authorities to obtain possession of land ledicated to public uses has been held to constitute, by necessary implication, an acceptance of the dedication. *Atlantic City* v. *Groff*, 64 N. J. L. 528; *Hohokus* v. *Erie Railroad Co.*, 65 *Id.* 362. So, too, formal action by the municipal authorities providing for the paving, curbing and guttering of a dedicated street at public expense, would constitute an acceptance of the dedication. In fine, any formal action with relation to property dedicated to public use as a highway, taken by the representatives of the public having authority over highways, which can only be legally justified upon the theory that the land dedicated is presently subject to a public user, constitutes a formal acceptance of the dedication."

In *Peoples Traction Co.* v. *Atlantic City &c. Ry. Co.*, 71 N. J. Law, 134, the court held that the dedicated street had been accepted (p. 135)

"by the city by resolution, accepting them, and also by the passage of this very ordinance, in which provision is made for their improvement by paving."

In *Arnold* v. *City of Orange*, 73 N. J. Eq. 280, the court held that the construction of a public sewer constituted an acceptance. The court said, page 283:

> "I think, however, that so important a municipal act as the construction of a public sewer by proper municipal authority at the expense of the municipality in a dedicated street connected with the municipality's general system of sewers, must be held to be an acceptance of the dedication of the street through which it is constructed."

These citations would seem to fully demonstrate the New Jersey law to be that upon a dedication by a land-owner of his land for a public highway, he cannot, even before acceptance by the municipality retract his dedication, nor can he after acceptance, secure the release of the dedicated lands and the discharge of the public servitude, except by action of the municipality.

It was doubtless the recognition of this rule by the parties to the contract of 1912, which caused them to provide in the contract (Article VI, "New Street") the provision that

> "this contract shall not be construed as a dedication of said driveway as a public highway."

(R. p. 316).

Our position is that notwithstanding this reservation the Railroad, by continuously permitting the public, or that part of the public having business with the Railroad and having rights of egress to Morris Street in Saw Mill Lane, to use this driveway, has devoted it to public use, although the fee thereof remained in the Railroad Company.

The New Jersey Court in *Welsh* v. *Morristown*, 98 N. J. Law, 630, took this view. It said, page 632:

> "The contract declared that 'said driveway (which is the subject of the ordinance) shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to

Morris Street in Saw Mill lane, but this contract shall not be construed as a dedication of said driveway as a public highway.' It thereby and otherwise appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company."

The evidence with respect to the fact that the parking place established by the ordinance of October 22, 1924 is located at the same place in the driveway as was the old parking place established by Mayor Todd, which was continued for some ten years.

Some of the Justices desired us to point out specifically the evidence relied on to support Point II(*b*) of our main Brief (p. 45).

In Point II(*b*) of our main Brief (p. 45) we argue:

"(b) *The parties to the suit, namely, the Railroad Company and the Town, by their conduct over a period of ten years practically have construed the contract to empower the Town to establish a parking place on the driveway in question.*"

In the supplemental statement of facts in our main Brief (p. 3) we said:

"Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D-3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place as is now designated in the ordinance of October 22, 1924, attacked in this suit (see Todd's testimony, R.

p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibits C-20 and D-6, R. pp. 28 to 31, and particularly p. 29, ll. 13 to 21)."

The Town Ordinance referred to reads as follows (Ex. D-3, R. p. 343):

> "Sec. 14. The Mayor is hereby authorized to designate such places within the town of Morristown as public stands for hacks, cabs, omnibuses, stages, carriages and other licensed vehicles, as he may deem expedient and proper, and to make such regulations and give such directions respecting the places or positions to be occupied by carriages or vehicles of any description, at the public stands or at the railroad stations, or elsewhere, as may be necessary to preserve order and promote public convenience; any person who shall neglect or refuse to obey any regulations or directions of the Mayor, authorized to be made or given by him, shall forfeit and pay a sum not exceeding Ten Dollars for each and every offense."

Mayor Todd first placed the public cabstand on the driveway in question near the triangular flower bed shown on the Map, but that was not a satisfactory location. This constituted the "preliminary experimenting" mentioned in our main Brief at page 3.

Shortly thereafter Mayor Todd changed the location and established the public cabstand at the place where it is now placed by the ordinance of October 22, 1924, under attack in this suit.

All this appears from the following evidence in the Record sent up:

John Todd testified (R. p. 334, line 13):

> "Q. Were you ever mayor? A. Yes.
>
> Q. From what year to what year? A. January 1, 1913, to January 1, 1915.
>
> Q. At the time you were mayor was the construction under way of the change of the grade of the Lackawanna Railroad tracks? A. It was.

Q. Pursuant to an agreement which had been entered into between the town and the railroad, dated September 24, 1912? A. Yes."

After identifying Section 14 of the ordinance (R. p. 335, line 15) which is quoted above, John Todd further testified (R. p. 336, line 23):

"Did you, pursuant to that section of the ordinance, make any designation of a hack stand on the plaza of the Lackawanna Railroad after the construction of the improvements had been completed, pursuant to the agreement D. 2 in evidence?

Mr. Stallman: I object to the question on the ground that whether or not any such designation was made by the mayor at that time is immaterial and irrelevant to the question of the validity of the ordinance under review.

A. I did.

Q. Where did you designate such hack stands to be?

Mr. Stallman: I object to that question on the same ground stated in the objection to the preceding question.

A. At the main station, at the wall at the end of the terrace.

Q. On the east or west side of the tracks? A. I think that is the west side—the main entrance to the station.

Q. Where else? A. There was a walk in between, and the east side I designated as a hack stand and cab stand.

Q. Did you designate any other stand? A. I did, on the opposite side, the east side, so-called, just opposite the railroad station. First, that did not work out satisfactorily, making a confusion and congestion of traffic. I abolished the stand opposite, and made a new stand alongside of the station, between the express office and the entrance.

Q. *By the side of the station, you mean where?* A. *Right up against the sidewalk.*"

Clyde Potts, the present Mayor, testified as follows (R. p. 165, line 20):

"Q. Now, to your knowledge following the completion of the elevation work where did the taxicabs, public taxicabs, park, on the east side of the tracks, north side I guess would be more accurate. A. East side, I guess.

Q. The tracks run east and west, north and south, all right; on the east side of the tracks? A. They first parked on the,—across the plaza from the shelter house on the sidewalk there, and then later they were changed to the westerly side of the plaza, *backing up against the sidewalk under the abutment wall.*

Q. *That is the easterly wall?* A. *Yes, sir, to the place that is in controversy in this case.*

Q. Do you know how long that continued along that easterly wall? A. Oh, it continued there until some time in January of 1913 when the injunction granted by Vice Chancellor Foster was served on the town and the cabmen."

W. Parsons Todd, a brother of John Todd and a commuter on the Lackawanna Railroad for some twenty-five years, testified (R. p. 233, line 23):

"Q. Have you had opportunity to observe the traffic conditions with respect to cab service and what not at the station? A. I have very carefully.

Q. You know of the passing of the ordinance which is referred to in the bill of complaint, which was passed in October of this year? A. I do.

Q. Following the passing of that ordinance where did the cabmen park their cabs and where did they stand when they solicited traffic? A. In the old, previous cabstand to the west of the shelter house, I guess you call it shelter house.

Q. *Along the easterly wall of the elevation?* A. *Yes.*

Q. *Do you remember the place where your brother as Mayor designated a cab stand?* A. *I do.*

Q. *Is that the same place you are speaking of?* A. *Same place.*

Q. Prior to the time when the contract with Welsh was made, which was the latter part of the year 1922, do

you know where the cabmen parked their cabs? A. In the same place.

Q. Do you know whether the Town of Morristown through its police department exercised any authority or jurisdiction on the station plaza? A. Yes; I have seen policemen there many times.

Q. Do you know whether they exercised any jurisdiction over the traffic? A. Yes, they did."

Police officer Meeker testified (R. p. 251, line 21):

"Q. Do you remember when Mayor Todd fixed that parking place? A. Yes, sir.

Q. Cab stand along the easterly wall? A. I do.

Q. That continued for some ten years, that cabstand, it stayed there for about ten years, didn't it, the one Mayor Todd fixed? A. Let's see, it must have been around ten years, yes, because it is about twelve years since the station was there.

Q. Were you as a police officer down there having to do with the traffic? A. Yes, sir."

The Circuit Court of Appeals, in speaking of the situation on the ground, says (R. p. 366, line 38):

"There is a driveway on the easterly side of the shelter house and the cab stand is along the curb of the driveway just north of the shelter house. This same place was designated as a cab stand by Mayor Todd shortly after the tracks were elevated pursuant to the contract between the town and the company of September 24, 1912, and had been so used until December 28, 1922, when the railroad company entered into a contract with LaClare L. Welsh."

The Text of the Decision of the New Jersey Court in the Welsh Certiorari Case.

The following is a copy of the report of the case of *Welsh* v. *Morristown*, 98 N. J. Law, 630; cited in our main Brief at pages 11, 13, 14, 19, 41, 42 and 45; and cited in the Brief of the Petitioner at pages 19, 24 and 32.

NEW JERSEY SUPREME COURT.

LaClare L. Welsh, Prosecutor, v. The Town of Morristown et al., Defendants.

Argued June 6, 1923—Decided July 20, 1923.

1. An ordinance enacting that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated public place, is, under present-day conditions, a "regulation of traffic."
2. The town of Morristown has authority by virtue of its municipal and contractual powers, by ordinance to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, in a designated part of a public driveway girdling a railroad station where the railroad company owning the fee had expressly granted to the town the right to regulate traffic. The town has power to enact such ordinance even though the railroad company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds and the exclusive privilege of parking vehicles at the place in question. Such ordinance, resting both on general municipal power and on the provisions of a track elevation contract (antedating that of the prosecutor) between the town and the railroad company (no question of lack of notice to the prosecutor being raised), does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws.

On *Certiorari*, &c.

Before Justices Trenchard, Parker and Bergen.

For the prosecutor, MAXIMILIAN M. STALLMAN.

For the defendants, NATHANIEL C. TOMS and CONOVER ENGLISH.

The opinion of the court was delivered by.

TRENCHARD, *J.* This writ brings up an ordinance of the town of Morristown entitled "An ordinance to regulate traffic on the driveway lying on the east side of the shelter-house of the Delaware, Lackawanna and Western Railroad Company in Morristown, extending from the American railway express office to Lackwanna place." It ordains that—

> "1. No automobile or other vehicle, either private or that which may be engaged in the transportation of passengers for hire, shall be parked or shall be allowed to stand for a longer time than is necessary to take on and let off passengers, expressage or baggage, and in no case for longer than two minutes, along the curb on the westerly side of the driveway mentioned in the title of this ordinance from the southerly side of the entrance-way to the shelter-house or the tunnel leading under the depot, northerly to the turn of said driveway under the railroad.
>
> "2. No automobile which may be engaged in the transportation of passengers for hire shall be so parked or so allowed to stand as prohibited in section 1 hereof on the remaining part of the westerly side of said driveway."

A penalty for violation is prescribed in the ordinance.

The status of the prosecutor is that he has a contract with the railroad company to furnish exclusive taxicab service at the station. That contract was entered into before the ordinance in question was passed. By it the company states its desire to regulate cab service and grants to the prosecutor "the exclusive right to solicit business as a cabman" on its

station grounds, and "the exclusive privilege of parking vehicles employed in said cab service when not in actual use in the spaces shown in green on the blueprint map hereto attached." One of such spaces is that described in the ordinance.

No question is raised with respect to the passage of the ordinance, nor is it challenged as an unreasonable exercise of municipal powers. Of the four reasons assigned by the prosecutor, the first is generally that it is beyond the power of the town to enact, and the other three rest on constitutional grounds, viz., that it deprives the prosecutor of his property without due process of law—takes his property for public use without just compensation and denies him the equal protection of the laws.

As we have seen, the ordinance in form and substance is on its face aimed at the regulation of vehicular traffic at the railroad station at a particular place in the driveway lying on the east side of the shelter-house of the railroad company extending from the American railway express office to Lackawanna place.

The town claims the right to enact this ordinance generally by virtue of its police power to regulate traffic in public places, and specifically by virtue of a contract with the railroad company made in 1912 and relating to the elevation of the station and tracks so as to avoid grade crossing. This contract was entered into by virtue of the various enabling statutes in that regard, particularly the act of 1901. *Pamph. L.* 116; *Comp. Stat.* p. 4266. It provides for a change in the station approaches partly by a new street to be laid out and made by the town and partly by a roadway built by the company. The general scheme as carried out resulted in a driveway girdling the station consisting in part of a plaza (the driveway in question) connected at its north end with Morris street (a main highway) by a roadway built by the company, and at the south end through the new street called Lackawanna place, a dedicated public street. The contract

declared that "said driveway (which is the subject of the ordinance) shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill lane, but this contract shall not be construed as a dedication of said driveway as a public highway." It thereby and otherwise appears that the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company.

This track elevation contract also contains this broad and significant language: "It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto."

In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town, and we have no doubt an ordinance enacting that no automobiles or other vehicles shall be parked or allowed to stand a longer time than is necessary to take on and let off passengers or baggage, and in no case longer than two minutes, is, under present-day conditions, a regulation of traffic.

By the contract with the prosecutor, as we have pointed out, the company undertook, in derogation of the control granted by the contract with the town, to establish a parking stand directly in one of the main driveways girdling the station, and where the town authorities might well say it is an obstruction and a nuisance.

For reasons presently to be stated, we deem the ordinance within the municipal and contractual powers of the town.

We think that the prosecutor, in contracting with the company, did so subject to the town's rights generally, and

specially under the contract of 1912, and cannot override them. No question of lack of notice on his part is raised.

There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order, and to enact that no automobile or other vehicle shall be parked or allowed to stand for a longer time than is necessary to take on and let off passengers, or baggage, and in no case longer than two minutes, in a designated public place. See the charter powers (*Pamph. L.* 1865, p. 819; *Pamph. L.* 1866, p. 427) and Home Rule act (*Pamph. L.* 1917, p. 358). See also *Belmar* v. *Barkalow*, 67 N. J. L. 504; *Combs* v. *Lakewood*, 68 *Id.* 582; *Atlantic City* v. *Brown*, 72 *Id.* 207, and *Irwin* v. *Atlantic City*, 90 *Id.* 99.

It is equally clear that the contract between the prosecutor and the railroad company did not deprive the town of the power which it had to enact the ordinance in question and to regulate traffic on the driveway. As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws. Avowedly, the ordinance was enacted in the exercise of the police power. Every citizen holds his property subject to the proper exercise of this power, either by the legislature directly or by public or municipal corporations to which the legislature may delegate it. It is well settled that laws and regulations of this character, relating to the comfort, health,

convenience, good order and general walfare of the inhabitants, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria,* or, in theory of the law, he is compensated for it by his sharing the general benefits which the regulations are intended and calculated to secure. *Dill. Mun. Corp.* 555, § 301; *Munn* v. *Illinois,* 94 U. S. 113. The question here is not precisely the right of the railroad company to make the contract with the prosecutor for the exclusive parking privilege. The prosecutor relies mainly upon the case of *Thompson's Express Co.* v. *Mount,* 91 N. J. Eq. 497. But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway. Whatever right may have been conferred upon the prosecutor by his contract with the railroad company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order, and deemed necessary for the public benefit. *Lindsey* v. *Anniston,* 104 Ala. 257; 16 So. Rep. 545; *Seattle* v. *Hurst,* 97 Pac. Rep. 454.

The writ will be dismissed, with costs.

The following is a copy of the report of the affirmance of the case of *Welsh* v. *Morristown*, 98 N. J. Law, 630, as reported *sub nom Welsh* v. *Potts*, 99 N. J. Law, 528.

"COURT OF ERRORS AND APPEALS.

LaClare L. Welsh, Appellant, v. Clyde Potts et al. Respondents.

Argued December 7, 1923—Decided April 11, 1924.

On appeal from the Supreme Court, whose opinion is reported in 98 N. J. L. 630, *sub nom. Welsh* v. *Morristown.*

For the appellant, *Congleton, Stallman & Hoover.*

For the respondents, *Nathaniel C. Toms and Conover English.*

Per Curiam.

The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

For affirmance—The Chief Justice, Minturn, Kalisch, Black, Campbell, Gardner, Van Buskirk, *JJ.* 7.

For reversal—Katzenbach, Clark, *JJ.* 2."

Respectfully submitted,

Conover English,
N. C. Toms,
Counsel for Respondent,
The Town of Morristown.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

AGAINST

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

BRIEF OF THE TOWN OF MORRISTOWN, RESPONDENT, IN OPPOSITION TO THE PETITION AND BRIEF OF THE PETITIONER.

Statement of the Case.

The Statement contained in the Petition (p. 2) should be supplemented by the following:

Pursuant to the Elevation Contract (R. p. 315), the Railroad Company dedicated from its lands such lands as were necessary for a new street, known as Lackawanna Place, and provided all the lands necessary for the laying out and establishing of a driveway on the station grounds connecting with and continuing said Lackawanna Place, and agreed that the said driveway along the easterly side of its

tracks and under said tracks, and into Morris street, should be kept open at all times for general foot and vehicular traffic to and from the station grounds on the easterly side of the railroad, and further agreed that the town should exercise all necessary police powers in and upon the station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.

Immediately following the completion of the improvement under the Elevation Contract the town exercised police powers in and upon the grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic, with the knowledge and consent of the Railroad Company. It established a parking place for taxicabs and enforced its regulations with respect thereto at the very same place designated in the ordinance of October 22, 1924 (R. p. 28), and that parking place continued until the making of the contract between the railroad and Welsh, dated December 28, 1922 (R. p. 22). Prior to the adoption of the said ordinance of October 22, 1924, the police committee of the Board of Aldermen after many months of study and investigation of traffic conditions at the station plaza, was of the opinion and reported that the said hack stand should be restored, and thereupon the town, in good faith and for the purpose of regulating foot and vehicular traffic in the said driveway, for the best interests of the traveling public and of the public welfare, adopted the said ordinance.

The Town claims and has always claimed the right to exercise all necessary police powers, including the regulation of foot and vehicular traffic and the establishment and removal of hack stands on the said driveway mentioned in said ordinance, because of the provision of the Elevation Contract (R. pp. 308-322), and also because said driveway is devoted to public use and is subject to public regulation in the interests of the public welfare.

We dispute the claim made in the Petition (p. 8) as to the far-reaching effect of the decision of the Circuit Court of Appeals, because of the presence of the Elevation Contract in this case, and the facts and circumstances growing out of the existence of that contract, which at once distinguish this case from an abstract attempt on the part of a municipality to exercise unwarranted dominion over a Railroad Company's property.

Material Parts of the Elevation Contract.

The Elevation Contract was between the Town, on the one part, the Morris & Essex R. R. Co. and the D. L. & W. R. R. Co., on the other part (Exhibit C 15, R. p. 308), and was based upon mutual stipulations and agreements and provided as follows (p. 321, l. 15):

> "It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for."

It is conceded on the record that the contract was performed by both parties (R. p. 291, l. 30, and p. 292, l. 35).

By the terms of the Elevation Contract the Railroad Company agreed under the caption "New Street" (p. 315, l. 22), to lay out the driveway, where the parking place mentioned in the ordinance is now located, as follows (p. 316, l. 28):

> "The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided, under the caption "Passenger Station," that the Railroad Company should erect a new passenger station with a shelter house on the easterly side of the tracks, and then provided (p. 317, l. 13):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

There is no proof in the case of any "rules and regulations" of the Railroad Companies (R. pp. 139-143, l. 15).

Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D 3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place now designated in the ordinance of October 22, 1924. (See Todd's testimony, R. p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibit C 20 and D 6, pp. 28 to 31, and particularly p. 29, ll. 13 to 21.)

Mayor Todd also gave instructions to the police to enforce this regulation, which they did (p. 329, l. 15).

The Town, through its police, continued to exercise authority over the driveway and station grounds generally. No complaint or objection was made by the Railroad Company until the making of the contract between the D. L. & W. R. R. Company, and Welsh, dated December 28, 1922 (Exhibit C 16, R. pp. 22 to 27), when a controversy ensued between the railroad, the Town and the cabmen, which resulted in a variety of litigation, including this suit.

Following the making of the Contract between the Railroad Company and Welsh (R. p. 22) the Town, by ordinance,

abolished the parking place which had originally been created by Mayor Todd on the driveway in question. Thereupon Welsh, represented by the same counsel who represented the Railroad Company, in this suit, applied to the New Jersey Supreme Court for a writ of certiorari to set aside this ordinance, but the court sustained the ordinance, and the decision of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals.

See *Welsh* v. *Morristown,* 98 N. J. L. 630; affirmed on opinion sub. nom. *Welsh* v. *Potts,* 99 N. J. L. 528.

Following this decision an injunction which had previously been issued by the New Jersey Court of Chancery against the Town was dissolved and thereupon the Town passed the ordinance of October 22, 1924, restoring the parking place as it had previously been designated.

Answering Petitioner's Point I (Brief, p. 9).

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment, but was justified under the police power by the public necessities, and because of the express agreement of the Railroad Company set forth in the Elevation Contract.

The Circuit Court of Appeals found that the facts fully justified the plea of the Town that the public necessities required the adoption of the ordinance of October 22, 1924, under the police power.

See the Opinion, Record p. 370.

See also the testimony of Mayor Potts, R. p. 168, ll. 20-35; p. 176, ll. 30-40; p. 199, ll. 5-35; and Chief of Police Wildey, R. p. 243, ll. 1-30.

The Circuit Court of Appeals held (R. p. 372, l. 8), that the Town "in enacting the ordinance establishing the parking place and in enforcing the same, was exercising the

police power delegated to it by the State, *and granted to it by the* (Railroad) *Company*".

There is no taking of the Railroad Company's property under the guise of regulation, as argued in Petitioner's brief (p. 10), because the regulation complained of is within the authority conferred upon the Town by the Railroad Company with respect to this very driveway, under the Elevation Contract.

Again the effect of the ordinance is not, as argued in Petitioner's brief (pp. 12-20), to enlarge the duties of the Railroad Company so as to include a taxicab service. The ordinance merely regulates traffic in the driveway, in the interests of the public having occasion to use the driveway. The Railroad Company agreed to such regulation by the Elevation Contract.

It agreed to and did provide the necessary lands and laid out the driveway, and agreed to keep it open for public travel (R. p. 316); and it further agreed that the Town should exercise all necessary police powers over the station grounds and driveways for the purpose of regulating traffic (R. p. 317).

All that the Railroad Company retained for itself under the Elevation Contract was the right of reversion in the driveway. It in effect turned over the use and control of the driveway to the Town. It provided that the legal effect of this turning over should not amount to a dedication in law, so that upon the termination of the contract the title to the land in the driveway would revert unimpaired to the Company. There is no foundation in the record for the claim (Petitioner's Brief, p. 18) that the effect of the ordinance is to make the Railroad Company a partner in the taxicab business, and the cases cited have no particular application to the facts here.

It is not disputed that under the authority of the Town's Charter and the Statutes of New Jersey, the Town had full power and authority to regulate traffic and establish parking places for public cabs in public places.

The courts have many times upheld such a right. In fact, the right arises out of immemorial custom. Thus in *Munn* v. *Illinois*, 94 U. S. 113, the court said (p. 125):

> "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c."

If the driveway in question were a dedicated public street there could be no doubt of the right of the Town to create a hackstand upon it, and the railroad as an abutting owner could not be heard to complain. In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, page 303, an ordinance of the City of Chicago creating a hackstand in the public street upon which the railroad company was an abutting owner was expressly upheld, page 304.

To the same effect, see

> *Swan* v. *Mayor, &c., of Baltimore*, 103 Atl. Rep. 441 (Md. Appeals).

Now, although the fee in the land remained in the Railroad Company, nevertheless by the elevation contract it was very evidently intended that the Town should exercise all necessary police powers in and upon the station, station grounds, approaches, and driveways, for the purpose of regulating foot and vehicular traffic at the station in the broad sense of that term. This must necessarily be implied from the fact that the station is a public place which is frequented by a large number of persons, that a large amount of foot or vehicular traffic of necessity abounds at said station, and that included in the vehicular traffic is that created by the presence of public cabs.

In order to have a public cab available to persons desiring the service of a cab, there must necessarily be established some place where a cab can conveniently be found. It could not reasonably be expected that public cabs should con-

tinuously drive up and down the driveway, waiting for some passenger to hail one of them or that the passenger should be expected to stand out looking for a moving cab which he could hail.

See

Masterson v. *Short,* 30 N. Y. Super. Ct. 241; 3 Abb. Prac. Ch. S. 154;

The Taxicab Cases, 143 N. Y. Supp. 279, at p. 293;

Waldorf-Astoria Hotel Co. v. *City of New York,* 105 N. E. Rep. (N. Y.) 803, at p. 806.

Now, while the cab stand created by the ordinance of October 22, 1924, is not on a dedicated public street, it is on the driveway in question, and this is on land which is devoted to a public use, both by customary use and under the terms of the Elevation Contract, and the reasoning of the foregoing cases fully applies.

The business of driving a public cab is a business devoted to public use. So held in *Munn* v. *Illinois, supra.*

The Taxicab Cases, supra, page 289;

Wolff Co. v. *Industrial Court,* 262 U. S. 522, at p. 535.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown,* 98 N. J. L. 630; 99 N. J. L. 528, had before it for construction this same Elevation Contract. The claim in that case, as in the case at bar, was that the ordinance there under review deprived the prosecutor of his property without due process of law and took his property for public use without compensation (98 N. J. L., p. 631). The court, after considering practically the same set of facts as is now before the court with respect to the use of the driveway, and also the language of the contract above quoted, reached the conclusion that the driveway in question was and is devoted to public

use, although the fee thereof remained in the Railroad Company. The court said (p. 632):

> "This track elevation contract also contains this broad and significant language: 'It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto.'
>
> In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town."

The court said further (p. 633):

> "There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order. * * *
>
> "It is equally clear that the contract (R. p. 22) between the prosecutor (Welsh) and the railroad company did not deprive the town of the power which it had to enact the ordinance in question and to regulate traffic on the driveway. As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws."

And once more, in dealing with the contract between Welsh and the Railroad Company, the court said (p. 635):

> "Whatever right may have been conferred upon the Prosecutor (Welsh) by his contract with the railroad

company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order and deemed necessary for the public benefit. *Lindsey* v. *Anniston*, 104 Ala. 257, 16 So. Rep. 545; *Seattle* v. *Hurst*, 97 Pac. Rep. 454."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 15), is not only not in point, but was distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*), where the Court said, in speaking of the *Mount* case (98 N. J. Law, at p. 634):

> "But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway."

The language of the contract must be read in the light of the conditions which it was designed to meet. Consideration must therefore be given to the fact that the place in question was a place frequented by the public, namely, the railroad station; that traffic of a public character, namely, public cabs, would make use of the driveway, bringing passengers to and taking away passengers from the station,

as well as the use by those having rights of egress to Morris street in Saw Mill Lane, so that when the agreement provided that the Town should exercise all necessary police powers for the purpose of regulating foot and vehicular traffic at the station, it must have been in the contemplation of the parties that the creation of a hackstand or parking place, at the station would be a part of the regulation of the foot and vehicular traffic which would necessarily accumulate there.

Any other view would be a narrow and restricted one which would not give full effect to the evident intention of the parties at the time the contract was made.

The parties to the suit, namely, the Railroad Company and the Town, have by their conduct over a period of ten years practically construed the contract as empowering the Town to create a parking place on the driveway in question.

There is no dispute whatever that for some ten years following the completion of the improvement, and until the present controversy began, a parking place for taxicabs had by regulation of the Town existed at the very place where the taxicab stand created by the ordinance of October 22, 1924. now is, and that this existed to the knowledge of the Railroad Company, and without any objection on its part.

This fact constitutes a most important piece of conduct evidence as showing the practical construction which the parties gave to the contract.

In *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, the Court said (p. 570):

> "Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves place upon it, and as to which they deal with each other, is, as between them, the one to be adopted and to be given by the Courts."

The courts recognize as a distinct doctrine, apart from the doctrine of laches, the doctrine of conduct evidence as precluding a party from later asserting a claim.

See:

Dennis v. *Jones*, 44 N. J. Eq. 513;
Clampitt v. *Doyle*, 73 N. J. Eq. 678;
Faulkner v. *Wassmer*, 77 N. J. Eq. 537, at p. 542.

The ordinance in question does not constitute a taking of the complainant's lands for public use without compensation or without due process of law, nor is it in contravention of the Fourteenth Amendment, because the lands taken are devoted to a public use.

A glance at the map (R. p. 21) indicates that the driveway physically runs into Lackawanna Place, so that, leaving out the question of boundary lines, it is to all intents and purposes a single street or driveway running along the easterly side of the elevation. It is all paved and curbed as one street, and it is not possible with the eye to tell where Lackawanna Place leaves off and the so-called driveway begins (R. p. 180, ll. 20 to 30).

Not only is the driveway used by persons having business with the Railroad, but it is used generally by traffic in and out of Saw Mill Lane.

Reference to the map shows Saw Mill Lane running off toward the northeast of the tracks. It is necessary to go through Saw Mill Lane in order to reach the Morristown & Erie Railroad depot, the Swift Company's beef house and a farmers' exchange (R. p. 189, ll. 25 to 40), also a lumber yard (R. p. 235, l. 15).

The result is a great deal of traffic in and out of Saw Mill Lane, some of which goes through the driveway under the Lackawanna tracks to Morris street, and some of which goes down the driveway on the easterly side of the elevation through Lackawanna Place and thence into Morris street. This traffic is both foot and vehicular (R. p. 193, l. 35; p. 235, ll. 10 to 40; p. 245, ll. 1 to 15).

Moreover, the rights of persons in and out of Saw Mill Lane is expressly recognized in the deed from the Morristown & Erie Railroad Company to the Morris & Essex Railroad Company, conveying a part of the present station grounds (R. p. 359, l. 30). That deed contains this significant language (R. p. 360, l. 16):

> "Subject, however, to any rights or right of passage thereon which may exist in favor of C. W. Ennis & Company, and the Swift Beef Company, and to the rights of the Town of Morristown, and The Morris & Essex Railroad Company, and any and all other rights, easements or claims thereof."

And see the Elevation Contract, Record, page 316, line 28, &c.

In *Welsh* v. *Morristown*, 98 N. J. Law 630; 99 N. J. Law 528, where the Court construed this same Elevation Contract, as applied to this same driveway, it held (p. 632) that the driveway "was and is devoted to public use, although the fee thereof remained in the Railroad Company".

The facts in the case at bar abundantly justify the Circuit Court of Appeals in finding as a fact that "the driveway was devoted to a public use" (R. p. 371, l. 4).

Since then the land upon which this driveway is located, although it may be private property in one sense, is, nevertheless, devoted to a public use, and as such is subject to municipal regulation under the police power inherent in the Town as a municipality.

See:

Dillon's Municipal Corp'ns, Vol. 1, 5th Ed., Sec. 301, p. 555;

Colley's Constitutional Limitations, 7th Ed. Ch. 16, p. 833;

Munn v. *Illinois*, 94 U. S. 113, at p. 125 & p. 130;

Chicago &c. R. R. v. *Nebraska*, 170 U. S. 57, at p. 72;

Union Dry Goods Co. v. *Georgia, P. S Corp*, 248 U. S. 372, at p. 376.

Producers Transportation Co. v. *Railroad Commission*, 251 U. S. 228, is very much in point. In that case the company had an operating pipe line from the oil fields to the

Pacific Coast, whereby it transported crude oil. The contention was that the pipe line was constructed solely to carry crude oil for particular producers under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use (p. 230). The court found, however, that the pipe line was in fact devoted to a public use, and said (p. 230):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission*, 176 California 518, 523, 526. And see *Munn* v. *Illinois*, 94 U. S. 113, 126; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483, 495; *Weems Steamboat Co* v. *People's Steamboat Co.*, 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, 419-420. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. *Munn* v. *Illinois*, *supra*.
>
> "The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil."

So, too, in *Munn* v. *Illinois* (*supra*), the owner of the elevator property was held to have devoted it to a public use.

The decision fully upholds the position of the Circuit Court of Appeals in its opinion, as set forth at page 369 of the Record (criticized in the Petitioner's Brief at p. 17), that land devoted to a public use is subject to regulations.

The driveway in question, upon which the ordinance has created a cab stand, is property of the Railroad Company devoted to a public use, and as such is ruled by the same principle of law, and is subject to reasonable regulation by the municipal authorities.

The right of a Railroad Company to contract with its favorite hackman or baggage transfer man in no nanner militates against the higher power of the municipality under its police powers to regulate traffic in the interest of all the people on a public driveway.

See:

Lindsey v. *Mayor &c. of Anniston,* 16 So. Rep. 545 (Sup. Ct. Ala.);

City of Seattle v. *Hurst,* 97 Pac. Rep. 454 (Sup. Ct. Washington);

Laddonia v. *Poor,* 73 Mo. Appeals, 465;

City of Chillicothe v. *Brown,* 38 Mo. Appeals, 609;

City of St. Paul v. *Smith,* 7 N. W. Rep. 734 (Minn.);

Veneman v. *Jones,* 20 N. E. Rep. 644 (Sup. Ct. Indiana);

Ex Parte Vance, 62 S. W. Rep. 568;

City of Emporia v. *Shaw,* 51 Pac. Rep. 237 (Kaiser's Appeals);

Emerson v. *Town of McNeil,* 106 S. W. Rep. 479 (Sup. Ct. Arkansas).

The fact that a part of the driveway happens to be located on property, the fee of which is in the Railroad Company, makes no difference here, because of the provision contained in the Elevation Contract (R. pp. 315-317).

For a case directly in point, upon almost the same state of facts and the same questions of law, see:

Welsh v. *Morristown,* 98 N. J. Law 630; Affirmed on Opinion, Sub. Nom. *Welsh* v. *Potts,* 99 N. J. Law 528.

The Circuit Court of Appeals found as a fact that the lands taken are devoted to a public use (R. p. 371).

Answering Petitioner's Point II (Brief, p. 21).

The ordinance of October 22, 1924, does not, in effect, construe the contract of September 24, 1912, as a grant of a public easement.

All that the Town has ever sought to do is to regulate traffic in the driveway in the interest of the traveling public. This the Railroad Company agreed the Town should do, reserving to itself the fee in the land by providing that the contract should not be construed as a dedication of the driveway as a public highway. A dedication would have deprived the Railroad Company of the title to the land, while the reservation of the fee in no way militates against the exercise of necessary police powers in and upon the driveway for the purpose of regulating traffic.

With respect to the enforcement of the rules and regulations of the Railroad Company, the record is devoid of proof of any rules or regulations (Record, pp. 139-143).

The contract with Welsh is not a rule or regulation within the scope of the contract.

The dissenting opinion by Judge Buffington overlooks that pertinent language of the Elevation Contract which confers upon the Town, with the consent of the Railroad Company, the right to exercise all necessary police powers in and upon the driveway for the purpose of regulating foot and vehicular traffic.

We respectfully submit that the reasons for the petition, as stated therein (p. 7), are not sufficient to warrant this Court in allowing the Writ of Certiorari prayed for.

Respectfully submitted,

ROBERT H. MCCARTER,
CONOVER ENGLISH,
N. C. TOMS,
Attorneys for the Respondent,
The Town of Morristown.

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IN THE

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Petitioner,

vs.

THE TOWN OF MORRISTOWN, HENRY LADEN and others, Respondents.

October Term, 1927.

No. 147.

BRIEF FOR RESPONDENT, THE TOWN OF MORRISTOWN.

Supplemental Statement of the Case.

The facts of this case are so material to the questions of law involved that the "Statement of the Case" in Petitioner's Brief (p. 2) should be supplemented as follows:

The map, which is a part of the record (R. p. 21), shows that the railroad tracks run roughly north and south. The main station building is on the west side of the tracks. On the east side is a platform, roofed over, which constitutes the so-called shelter house. The platform and tracks are elevated.

A driveway starts from Morris street and runs under the tracks north of the station, and from there runs southerly along the easterly retaining wall and shelter house. This driveway runs into and becomes a part of Lackawanna Place, which continues southerly and alongside of the easterly retaining wall until it runs into Morris street south of the station.

Passengers from New York and points east alight from the trains on the elevation, go downstairs and approach the driveway through a tunnel under the elevation platform. This tunnel comes out on the driveway, north of where the driveway becomes Lackawanna Place.

Prior to the making of the contract between the Railroad Company and the Town in 1912, the tracks were at grade and were elevated as the result of this contract.

The Elevation Contract was between the Town, on the one part, the Morris & Essex R. R. Co. and the D. L. & W. R. R. Co. on the other part (Exhibit C-15, R. p. 308), and was based upon mutual stipulations and agreements and provided as follows (R. p. 321, l. 15):

> "It is further stipulated and agreed that each and every of the acts and things to be done and performed by each of the parties hereto is essential consideration for the acts and things to be done and performed by the other party, and that each of the terms of this contract is a necessary and proper part of the work of improvement herein provided for."

It is conceded on the record that the contract was performed by both parties (R. p. 291, l. 30, and p. 292, l. 35).

By the terms of the Elevation Contract the Railroad Company agreed in Article VI under the caption "New street" (R. p. 315, l. 22), to lay out the driveway, where the parking place mentioned in the ordinance is now located, as follows (R. p. 316, l. 28):

> "The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided, in Article VII, under the caption "Passenger Station," that the Railroad Company

should erect a new passenger station with a shelter house on the easterly side of the tracks, and then provided (R. p. 317, l. 13):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

There is no proof in the case of any "rules and regulations" of the Railroad Companies (R. pp. 139-143, l. 15).

Following the completion of the work under the Elevation Contract, the then Mayor of Morristown, John Todd, acting under authority of an ordinance of the Town, which authorized the Mayor to designate such places as public stands for hacks, cabs, etc., as he might deem expedient and proper (Exhibit D 3, R. p. 343), after some preliminary experimenting designated as a cab stand the place along the curb of the driveway on the easterly side of the shelter house, which is the same place as is now designated in the ordinance of October 22, 1924, attacked in this suit (see Todd's testimony, R. p. 337, l. 10 to p. 339, l. 10, and see the ordinance, Exhibits C-20 and D-6, R. pp. 28 to 31, and particularly p. 29, ll. 13 to 21).

Mayor Todd also gave instructions to the police to enforce this regulation, which they did (R. p. 329, l. 15).

The Town, through its police officers, continued to exercise authority over the driveway and station grounds generally until the making of the contract between the D. L. & W. R. R. Company, and Welsh, dated December 28, 1922 (Exhibit C-16, R. pp. 22 to 27), when a controversy ensued between the railroad, the Town and the cabmen, which resulted in a variety of litigation, including this suit.

The contract which the Railroad Company made with Welsh created him the Railroad Company's favorite cabman and gave him the exclusive right to solicit business as a cab-

man on the station grounds; the exclusive privilege of installing a cab stand with telephone facilities in the station, and the exclusive privilege of parking his vehicles in the driveway along the easterly wall in the same place, which is now designated by the ordinance of October 22, 1924 (see the contract, Exhibit C-16, R. p. 23, ll. 1 to 20; p. 127, l. 24; p. 136, l. 10; p. 234, l. 30).

Following the making of the contract with Welsh, and in January, 1923 (R. p. 165, l. 35; p. 360, l. 26), the railroad filed its bill and obtained an injunction from the New Jersey Court of Chancery, enjoining the public cabmen from parking their cars on the driveway.

Thereupon the Town, in order to provide a parking place for the public cabmen, established a parking place for them on Lackawanna Place, a few yards south of, and a physical continuation of, the driveway in question and on the same east side of the elevation, and an ordinance was thereafter passed establishing that place as a public hack stand (R. p. 346, l. 20).

By an ordinance passed February 7, 1923 (Exhibit C-19, R. p. 325, and Exhibit D-4, R. p. 344), and following the Chancery injunction, the Town abolished the parking place which had originally been created by Mayor Todd on the driveway in question. This avoided any "head on" meeting of the public cabs with Welsh's cabs (Petitioner's Brief, p. 4). A further result of this was that Welsh was unable to longer park his cabs on this driveway without incurring the penalty prescribed in the ordinance. Welsh thereupon applied to the New Jersey Supreme Court for a writ of certiorari to set aside this ordinance, but the court sustained the ordinance, and the decision of the Supreme Court was affirmed by the New Jersey Court of Errors and Appeals.

> See *Welsh* v. *Morristown*, 98 N. J. L. 630; affirmed on opinion sub. nom. *Welsh* v. *Potts*, 99 N. J. L. 528.

As a result of the decision in that case the injunction which had issued out of the New Jersey Court of Chancery

was dissolved (R. p. 101), and the Town was again free to deal with the traffic problem at the station plaza.

By this time it was demonstrated that the removal of the hack stand to Lackawanna Place did not work satisfactorily.

The traffic conditions at the station were the subject of careful study by Mayor Potts and the Chief of Police (R. p. 167, ll. 20 to 35, and p. 242, l. 40); also by the police committee of the Board of Aldermen (R. p. 110, l. 16, and p. 243, l. 3). They found that the new parking place was not as convenient as the old one had been and there were many complaints (R. p. 107, ll. 35 to 40). And in bad and rainy weather it constituted a menace to health (R. p. 168, l. 27, and p. 243, l. 25). A large number of commuters petitioned the Town to restore the cab-stand to the place on the driveway where it had always been since the elevation of the tracks.

Accordingly and in the interest of the safety, welfare and comfort of the public using the driveway the ordinance of October 22nd, 1924, was adopted.

The effect of that ordinance was to restore the public cabmen, as well as Welsh, to the cab stand on the driveway, and the public cabmen remained there until restrained by the injunction of the District Court.

The confusion at the loading point mentioned in Petitioner's brief (p. 4) is the result of the injunction in the instant case, which makes necessary the continuance of a cab stand on Lackawanna Place for the public cabmen, and is no fault of the Town.

The preamble to the ordinance of October 22, 1924, re-establishing the public hack stand in the driveway reads as follows (R. p. 28):

> "AN ORDINANCE RELATING TO TRAFFIC ON THE DRIVE WAY LYING ON THE EAST SIDE OF THE LACKAWANNA DEPOT IN THE TOWN OF MORRISTOWN, ESTABLISHING ADDITIONAL HACKSTAND AND REGULATING PARKING AND HACKING.
>
> WHEREAS, this governing body has received petitions from over three hundred commuters and patrons of the

Delaware, Lackawanna & Western Railroad, asking that the public hack stand for West bound trains be restored to its former place where it stood for so many years; and it appearing from said petitions and from the report of the Police Committee upon the same that the present stand is inconvenient and in rainy inclement weather adds greatly to the discomfort of, and in the opinion of the Committee constitutes a menace to the health and safety of the traveling public, and particularly so in winter weather, and that numerous complaints other than the said petitions have been received by the Committee from the traveling public, of the inconvenience and discomfort by reason of the present arrangement and the Committee, after an investigation and study of the conditions during the past twenty months, recommending as a matter of better traffic regulation and in order to prevent inconvenience and discomfort to the traveling public and to protect their health and safety, that the said change be made; and this governing body concurring in the recommendations of the Committee and being of the opinion that a change should be made establishing said hack stand at its said former place and making other changes in the traffic regulations at the station;" * * *

Mayor Potts testified (R. p. 168, l. 20):

"* * * what did you do following the lifting of that Chancery injunction? A. The police committee had a conference and decided after 14 or 15 months of trial with the cab stand on Lackawanna Place it was not as desirable a place to have the cabs stand while they were waiting for their fares, that it was inconvenient to the traveling public, and in rainy and bad weather it constituted a menace to their health, and therefore they recommended to the Board that the taxicab stand be moved back to the place it had occupied for some ten or twelve years, and recommended the passage of an ordinance fixing that as a stand where the cabs waiting for fares could wait."

Mr. Coggeshall, a member of the Board of Aldermen and of the Police Committee of the Board (R. p. 104, l. 10), testified that the parking of cabs on Lackawanna place inter-

fered with traffic conditions at the station and made it more difficult in wet weather (R. p. 111, ll. 1 to 8).

Chief of Police Wildey testified that after a study of the situation, in conjunction with the Board of Aldermen and the Mayor, and from the experience which they had had with the traffic problem, the best place for the location of a hack stand was at the point designated by the ordinance, on the driveway in question (R. p. 243, ll. 1 to 30).

The ordinance did more than merely establish the hackstand in the driveway; it carefully safe-guarded the rights of the railroad with respect to any crowding on the sidewalks or entrances to the station building It provided (R. p. 30, l. 10):

> "nor shall the owner or driver of such vehicle awaiting employment at any designated stand leave the said vehicle, nor shall he move the same from the designated stand to take a passenger or passengers until summoned therefor, either by said passenger or passengers or by an officer of the Town charged with that duty, nor shall he solicit custom for any such vehicle awaiting employment when away or off from said hack stand. No owner or driver of any such vehicle while awaiting employment or otherwise, shall solicit custom in any noisy, persistent or offensive manner, nor use indecent or profane language, nor be guilty of boisterous talking or shouting or any disorderly conduct; nor vex or annoy travellers or citizens, nor at any time employ or permit any other person to ask or solicit said custom."

The great preponderance of proof was that this last provision of the ordinance was observed by the cabmen See testimony of cabmen as follows: *Durling,* R. p. 256, ll. 1-10; *Laden,* R. p. 269, l. 10; *Tanner,* R. p. 275; *Bracey,* R. p. 285; and Chief of Police Wildey, R. p. 249, ll. 20-30.

Points Upon which Respondent Intends to Rely.

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway, because,

(I) the driveway constitutes property which is devoted to a public use; and was further justified, because,

(II) the regulation of traffic on the driveway by the Town is authorized by the contract of 1912 between the railroad company and the Town, and the establishment of a parking place on the driveway was acquiesced in by the Town for many years.

Summary of the Argument.

The ordinance creating the parking place does not constitute a taking of the petitioner's property contrary to the Fourteenth Amendment. "Since the property is devoted to a public use it is liable to be controlled for the public good." Under its police powers as a municipality and by virtue of the statutes in New Jersey the Town has power to regulate traffic by ordinance including the establishment of cab-stands. This power is not infringed by the existence of the contract between Welsh and the railroad company creating Welsh the company's favorite cabman. The determination of the local municipal authorities as to the necessity of the parking place is entitled to great consideration by this court. The fact that the railroad company retains the fee to the land in the driveway does not constitute the regulation of traffic on the driveway by the Town a taking of its property under the facts and circumstances of this case.

Furthermore, the railroad by its contract conferred authority on the Town to regulate traffic in the driveway. The establishment of a parking place is a regulation of traffic. The railroad through a long period of years has recognized and acquiesced in such regulation, and to the establishment of a cab stand on the *locus in quo*.

ARGUMENT.

The establishment of a parking place on the driveway in question was not contrary to the Fourteenth Amendment, but was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway and was authorized under the express agreement of the Railroad Company set forth in the contract.

This is our fundamental proposition as applied to the facts of this case.

The Circuit Court of Appeals found that the facts fully justified the plea of the Town that the public necessities required the adoption of the ordinance of October 22, 1924, under the police power.

> See the Opinion, R. p. 370.
>
> See also the testimony of Mayor Potts, R. p. 168, ll. 20-35; p. 176, ll. 30-40; p. 199, ll. 5-35; and Chief of Police Wildey, R. p. 243, ll. 1-30.

The Circuit Court of Appeals held (R. p. 372, l. 8), that the Town "in enacting the ordinance establishing the parking place and in enforcing the same, was exercising the police power delegated to it by the State, and granted to it by the (Railroad) Company."

A glance at the map (R. p. 21) indicates that the driveway physically runs into Lackawanna Place, so that, leaving out the question of boundary lines, it is to all intents and purposes a single street or driveway running along the easterly side of the elevation. It is all paved and curbed as one street, and it is not possible with the eye to tell where Lackawanna Place leaves off and the so-called driveway begins (R. p. 180, ll. 20 to 30). This statement of the situation does

not ignore the important fact of boundary lines (Petitioner's Brief, p. 27) which are admitted to exist: it merely emphasizes the other important fact, that regardless of boundary lines this driveway has all the physical characteristics and use of a public street. 3,000 people patronize the railroad station daily (R. p. 7), and at times the driveway is crowded with traffic (R. p. 370, l. 30).

Not only is the driveway used by persons having business with the Railroad, but it is used generally by traffic in and out of Saw Mill Lane.

Reference to the map shows Saw Mill Lane running off toward the northeast of the tracks. It is necessary to go through Saw Mill Lane in order to reach the Morristown & Erie Railroad depot, the Swift Company's beef house and a farmers' exchange (R. p. 189, ll. 25 to 40), also a lumber yard (R. p. 235, l. 15).

The result is a great deal of traffic in and out of Saw Mill Lane, some of which goes through the driveway under the Lackawanna tracks to Morris street, and some of which goes down the driveway on the easterly side of the elevation through Lackawanna Place and thence into Morris street. This traffic is both foot and vehicular (R. p. 193, l. 35; p. 235, ll. 10 to 40; p. 245, ll. 1 to 15).

It may be, as Petitioner's Brief argues (p. 32), that the language of Article VI of the contract, which mentions the use of the driveway by those "now having right of egress to Morris Street in Saw Mill Lane" imports a private right in the driveway to those persons; but that does not alter the fact that others of the general public are, and for a long time have been, using the driveway for the purpose of going to and from the various business establishments on Saw Mill Lane.

Nor can the fact be ignored that many persons come and go every day to the railroad station. That there is a deal of traffic, and hence public user, in the driveway, is abundantly demonstrated in the Record (see testimony *Potts*, R. p. 194; *Todd*, R. p. 235; *Wildey*, R. p. 245; *Durling*, R. p. 254).

And this necessarily follows from the fact that this driveway is to all interests and purposes a public street leading to and alongside of a busy railroad station (R. p. 7, ll. 7-10).

The fact that only that part of the public having business with the railroad company and those of the public having occasion to go to and from Saw Mill Lane use this driveway, does not deprive it of its public character.

In *Van Dyke* v. *Geary*, 244 U. S. 39, this Court by Mr. Justice Brandeis said (48):

> "The fact that the service is limited to a part of the town of Miami does not prevent the water system from being a public utility."

If, as is argued in petitioner's brief (p. 11), the ordinance takes the property of the railroad, the answer is that it is not an unconstitutional taking because:

1) The property being devoted to a public use and so clothed with a public interest, is subject to reasonable regulation.

Munn v. *Illinois*, 94 U. S. 113;
Chicago, &c., R. R. v. *Nebraska*, 170 U. S. 57;
Noble State Bank v. *Haskell*, 219 U. S. 104;
Missouri Pacific Ry. v. *Omaha*, 235 U. S. 121;
Union Dry-Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372;
Producers Transportation Co. v. *Railroad Commission*, 251 U. S. 228;
Block v. *Hirsh*, 256 U. S. 135;
Milheim v. *Moffat Tunnel Dist.*, 262 U. S. 710.

2) The railroad by its contract consented to a taking for the purpose of regulating traffic when it opened its driveway to public traffic and permitted the Town to exercise all necessary police power upon it to regulate that traffic.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548;
Welsh v. *Morristown*, 98 N. J. Law 630.

POINT I.

The ordinance in question does not constitute a taking of the complainant's lands for public use without compensation or without due process of law, nor is it in contravention of the Fourteenth Amendment, because the lands taken are devoted to a public use.

The general rule is that property may be regulated to a certain extent to protect the public health, safety, welfare, comfort or morals from dangers threatened.

It is only when the regulation goes too far that it will be recognized as a taking.

Pennsylvania Coal Co v. *Mahon,* 260 U. S. 393, page 415.

The decisions in this court plainly intimate that each case has to depend on its own facts and circumstances.

(a) The town under its police power has power to regulate traffic by ordinance, including the establishment of cab stands.

It is not disputed that under the authority of the Town's Charter and the Statutes of New Jersey, the Town had full power and authority to regulate traffic and establish parking places for public cabs in public places.

The courts have many times upheld such a right. In fact, the right arises out of immemorial custom. Thus in *Munn* v. *Illinois,* 94 U. S. 113, the court said (p. 125):

> "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, *hackmen,* bakers, millers, wharfingers, innkeepers, &c."

If the driveway in question were a dedicated public street there could be no doubt of the right of the Town to create a hackstand upon it, and the railroad as an abutting owner could not be heard to complain. In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, page 303, an ordinance of the City of Chicago creating a hackstand in the public street upon which the railroad company was an abutting owner was expressly upheld, page 304.

To the same effect, see

Swan v. *Mayor, &c., of Baltimore,* 103 Atl. Rep. 441 (Md. Appeals).

Dillon on Municipal Corporation, Vol. 3 (5th Ed.), Sec. 1167.

In this connnection it may be observed that the courts of New Jersey fully uphold the authority of a municipality to enact ordinances to license and regulate cabmen, regulate traffic, specify parking places and the like.

See

Belmar v. *Barkalow,* 67 N. J. Law 504, page 505;
Combs v. *Lakewood,* 68 N. J. Law 582, page 583;
Atlantic City v. *Brown,* 72 N. J. Law 207;
Erwin v. *Atlantic City,* 90 N. J. Law 99, page 101;
Welsh v. *Morristown,* 98 N. J. L. 630, page 633; affirmed 99 N. J. L. 528.

(b) Nor does the contract between Welsh and the railroad Company (Exhibit C-16, R. p. 22) militate against the power of the town to pass an ordinance to establish a cab-stand as a regulation of traffic.

We do not dispute the right of the railroad to make the contract with Welsh. Such a right has been expressly upheld by the New Jersey Court of Errors and Appeals in *Thompson's Express and Storage Co.* v. *Mount,* 91 N. J. Eq. 497, and by this Court in *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279.

But the existence of that contract does not militate against the power or authority of the Town to regulate the traffic.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown*, 98 N. J. Law, 630; 99 N. J. Law, 528, considered this very question. The Court said (98 N. J. Law, at p. 635):

> "Whatever right may have been conferred upon the Prosecutor (Welsh) by his contract with the railroad company, such contract must be deemed to have been entered into in view of, and in subordination to, the right of the town authorities to exercise the power to regulate traffic. The law silently incorporates itself into the contract of the parties. They could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate traffic, nor is it to be presumed that they intended any embarrassment or diminution of the power when exercised. The more reasonable presumption is that it was intended that any unlimited parking privileges conferred should not endure if they came in conflict with the regulations ordained by the town authorities in the valid exercise of a power intended for the promotion of good order and deemed necessary for the public benefit. *Lindsey* v. *Anniston*, 104 Ala. 257, 16 So. Rep. 545; *Seattle* v. *Hurst*, 97 Pac. Rep. 454."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 17), is not only not in point, but was distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*), where the Court said, in speaking of the *Mount* case (98 N. J. Law, at p. 634):

> "But that case is not in point. There the only part of the railroad company's property which was involved was the platform of the Lakewood station, upon which no one had a right other than passengers or others having business with the railroad; whereas, here, the public generally have the right to use the driveway."

The authorities generally uphold the right of a municipality, under the police power, to regulate with respect

to the location and conduct of hackmen, transfer agents and the like, notwithstanding these regulations run counter to contracts made between the railroad company and its favorite hackman or baggage transfer man, or that they to some degree interfere with the rights of the railroad company in its property.

In *Emerson* v. *Town of McNeil,* 106 S. W. (Sup. Ct. of Ark.) 479, the ordinance prohibited the soliciting of custom or patronage for any hotel or hack line on the "gravel platform belonging to the railroad company" (p. 479). The court sustained the ordinance, saying (p. 480):

> "The power conferred and as exercised is not obnoxious to, or an interference with any common right, but is a proper exercise of the police power, and is universally sustained. McQuillan on Municipal Ordinances, Sections 28, 184; *City of St. Paul* v. *Smith,* 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; *Veneman* v. *Jones,* 118 Ind. 41, 20 N. E. 644; 10 Am. St. Rep. 100. The fact that the platform upon which they were forbidden to solicit customers at this interval was the property of the railroad company does not affect the power. McQuillan says: 'Ordinances regulating hackmen, etc., while they are in and about landings, depots and stations, are valid, although the property of such places is not that of the city, or strictly speaking, public property of any kind." McQuillan on Municipal Ordinances, Sec. 28."

In *City of St. Paul* v. *Smith,* 7 N. W. (Minn.) 734, the ordinance provided that no hackman should park his hack on any street or public grounds adjacent to any railroad or railway depot except on designated places. The court said (p. 735):

> "The fact that the ground about the depots or stations where these ordinances are to be enforced is not the property of the city, or public property of any kind, strictly speaking, is not important. The fact that it is commonly used by hackmen in their business, for the purposes mentioned in the ordinances, is sufficient."

A well-considered case is *Lindsey* v. *Mayor, etc., of Anniston,* 16 Southern Reporter (Sup. Ct. Alabama), 545, where an ordinance provided that no hackman, agent of any transfer company or hotel proprietor should go within the depot of the railroad for the purpose of soliciting patronage for his hack, transfer company or hotel (p. 546).

A contract founded on a valuable consideration between the transfer company and the railroad, gave Lindsey as an employee of the transfer company the privilege of soliciting baggage within the Union Depot (p. 545). Lindsey was convicted under the ordinance and his conviction affirmed. The court commented on the power of the city under its charter to prescribe rules according to which the business of hackmen may be regulated, citing *Munn* v. *Illinois,* 94 U. S. 113, and 1 *Dillon Municipal Corporations*, § 328, and referring to the contract between the transfer company and the railroad, said (p. 546):

> "The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. *Knoxville Corp.* v. *Bird,* 12 Lea. 121."

And the Court concluded (p. 547):

> "the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria.* I Dill. Mun.Corp., Sec. 141; *Vanderbilt* v. *Adams,* 7 Cow. 349. The individual shares in and public benefit which it is intended to promote, and this is the compensation deemed by the law adequate."

In *City of Seattle* v. *Hurst*, 97 Pac. Rep. (Sup. Ct. of Washington) 454. There was a contract between the transfer company and the railway company, based on a valuable consideration, which contained recitals very similar to those in the contract between Welsh and the railroad company in the case at bar (p. 11), and gave the transfer company the exclusive right and privilege to enter upon the trains of the railroad company approaching Seattle and into the said depot and train shed and to solicit and contract with passengers for the transfer of their baggage.

The contention of the appellant and the court's position thereon was stated by the court as follows (p. 456):

> "It is argued by the appellant, at length, that the King Street Station or Union Depot is the property of the Great Northern Railway Company, and as such is to be deemed in every legal sense private property of the railway company as between itself and those of the general public who have no occasion to use the depot for purposes of transportation, and that it is lawful for the railway or depot company to make a contract granting special privileges to certain persons for supplying passengers with hacks or conveyances or baggage transfer. Many cases are cited to support that position. * * *; but that position is not the controlling question in this case. It may be conceded that the depot is the private property of the railway company, and that the railway company may grant special privileges therein. But this case, in our opinion, depends upon the validity of the ordinance."

And see to the same general effect *Williams* v. *Arkansas*, 217 U. S. 79, and *Ex Parte Barmore*, 163 Pac. Rep. (Cal.) 50, and *Ex Parte Maynard*, 275 S. W. Rep. (Texas) 1070, in both of which many cases are cited.

(c) The lands taken are devoted to a public use. The driveway constitutes the only street approach to the easterly side of the railroad station and is so clothed with a public interest that it is subject to reasonable regulation with respect to the traffic thereon.

Questions of the public health or safety are paramount to contract rights. See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, page 501; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269, page 274; *Williams* v. *Arkansas*, 217 U. S. 79, p. 89.

And where property is clothed with a public interest or devoted to a public use, it is liable to be controlled for the public good.

The Circuit Court of Appeals held that the regulation for the establishment of the cab-stand in the resolution of October 22nd, 1924 was imposed to protect the public safety (R. p. 370, ll. 10-25). No attack was made upon the place designated for the cab-stand as an unreasonable place nor is the ordinance attacked as an unreasonable exercise of police power (R. p. 370, l. 25).

(1) The ordinance was passed pursuant to authority delegated to the Town by the Legislature of the State and as such it is a State law within the meaning of the Constitution.

In *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, this court, by Mr. Justice Pitney, said, page 555:

> "A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148; *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, 590; *Grand Trunk Ry.* v. *Indiana R. R. Comm.*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162."

See to the same effect *Reinman* v. *Little Rock*, 237 U. S. 171, page 176.

(2) This court, while not bound to do so, is accustomed to defer a good deal to the tribunal on the spot.

See *Welch* v. *Swasey,* 214 U. S. 91, p. 106, where the ordinance involved the question of the height of buildings.

Laurel Hill Cemetery v. *San Francisco,* 216 U. S. 358, p. 365, where an ordinance forbidding burials within the city limits of San Francisco was involved.

Patsone v. *Pennsylvania,* 232 U. S. 138, p. 144, where the question was as to the validity of an act making it unlawful for an alien to own or possess a shotgun or rifle.

In *Welsh* v. *Morristown,* 98 N. J. Law, 630; 99 N. J. Law, 528, the State Court, dealing with the same identical driveway, as here, held (98 N. J. Law, at p. 632) that

> "the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company."

And this Court in *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, said, at page 719:

> "The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.,* 240 U. S. 30, 32."

See also *F. C. Ayres Mercantile Co.* v. *Union Pac. R. Co.,* 16 Fed. (2nd) 395, p. 397.

(3) The ordinance was passed in the interest of the public welfare, the driveway being devoted to a public use.

In *Missouri Pacific Railway* v. *Omaha,* 235 U. S. 121, the question was whether the requirement that the railroad at its own expense should construct a viaduct over and across its line of railway for the foot and vehicular traffic of the City was contrary to the due process provision of the 14th amendment. This court said (p. 129):

> "The safety of the travelling public is the primary consideration."

And again, at page 131, this court said:

> "The local authorities are presumed to have knowledge of local conditions and to have been induced by competent reasons to take the action which they did."

All that is sought by the ordinance in question here is to so regulate the traffic at the station as to protect the safety, health, good order, comfort and general welfare of the travelling public having occasion to use the railroad station.

> *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, p. 558.

In *Munn* v. *Illinois,* 94 U. S. 113, this Court by Chief Justice Waite said (bottom p. 125):

> "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use but, so long as he maintains the use, he must submit to the control."

In *Donovan* v. *Pennsylvania Company,* 199 U. S. 279, this Court said (p. 292):

> "In *Olcott* v. *The Supervisors,* 16 Wall. 678, 694, 695, it was adjudged that a railroad, whether constructed by a private corporation or by individuals under the authority of a legislative grant, or by the State itself, was a public highway, and that the function performed by

the corporation was that of the State, and the uses to which its property was devoted were of a public nature. In *Queensbury* v. *Culver,* 19 Wall. 83, 91, it was said that the construction or maintenance of a public highway was 'for the promotion of a public use.' So in *Township of Pine Grove* v. *Talcott,* 19 Wall. 666, 676, which involved the validity of taxation, under legislative authority, to aid in the construction of a railroad by a corporation: 'Though the corporation was private, its work was public, as much so as if it were to be constructed by the State.' Again in *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641, 657: 'The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control that the corporation by which it is conconstructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner in the mode prescribed by law.' To the same effect are *United States* v. *Freight Association,* 166 U. S. 290, 332; *Smyth* v. *Ames,* 169 U. S. 466, 544; *Lake Shore, &c. Ry.* v. *Ohio,* 173 U. S. 285, 301. *Necessarily, the same principles apply in reference to the use of the Company's station house and depot grounds; for they are held in the same right as are its road,* its locomotives and other property or appliances employed in the transportation of passengers and freight, *and must be devoted primarily to public use to the extent necessray for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway."*

In *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, the allegations, *inter alia,* were (p. 715) that the tunnel was not intended as a public highway for the use of the general public but for the benefit of the Moffat Road. This court said (p. 717):

"1. *Public Purpose.* The nature of a use whether public or private, is ultimately a judicial question. However, the determination of this question is influ-

enced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State. *Rindge Co.* v. *Los Angeles, ante,* 700, and cases therein cited. And like respect should be accorded to the declarations of the legislative body of the State. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 160. Here the legislature, familiar with the local conditions, has declared that the construction of the tunnel will benefit the people of the State; and both the local court of the State and its Supreme Court have held its construction to be for a public purpose."

In *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, the railroad had acquired a strip of land 130 feet wide on which were laid railroad tracks. As stated in the opinion (p. 551):

"The town naturally grew along the railroad, and the right of way, so far as not occupied by the tracks, was and still is used for the ordinary purposes of a street, without objection by plaintiff in error or its predecessors in title. In laying out the town, this right of way was designated as a street 130 feet wide; the portion lying east of the tracks being designated as East Center Street, the portion on the west of the tracks as West Center Street."

Cross streets were laid out, and the portion between the cross streets, Ash and Spruce Streets, four blocks, was in the heart of the City.

The Town adopted a series of ordinances designed to limit the use of the tracks with respect to the speed of trains, shifting of cars, standing of cars and also requiring the railroad to lower the tracks so as to make them conform to the grade-line of the streets. The judgment of the State Court upholding the ordinances was affirmed. This Court, by Mr. Justice Pitney, said (p. 557):

"And we are not at present particularly concerned with either contract or property rights, except as they may

serve to show the conditions under which the ordinances were adopted, and may bear upon the question of the reasonableness of those regulations. These have to do with the use and control of the property, rather than with its ownership; with the mode in which the franchise shall be enjoyed, rather than with its scope. Conceding, for argument's sake only, the utmost that may be claimed as to the charter and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the State, or by its authorized agency. *Adopting the extreme assumption that the railroad company has still a complete and unqualified ownership of every portion of the strip of land that was originally acquired in fee simple, and as proprietor might lawfully exercise its dominion by excluding the public from it; yet it does not do this, but permits, and long has permitted, the public to use material portions of the strip for ordinary street purposes;* it apparently excludes the public from no portion except as the existence of the tracks and the passage of trains may have such a tendency or effect. *And thus the Company, at least for the time, devotes its property in part to public uses* that are more or less inconsistent with the railroad uses, and under conditions such as to render the railroad operations necessarily a source of danger to the public while enjoying the permitted use. Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non laedas,* so far as may be requisite for the protection of the public.

For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter-House Cases,* 16 Wall. 36, 62; *Munn* v. *Illinois,* 94 U. S. 113, 125; *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33; *Mugler* v. *Kansas,* 123 U. S. 623, 667; *Crowley* v. *Christensen,* 137 U. S. 86, 89; *New York &c.*

R. R. Co. v. *Bristol,* 151 U. S. 556, 567; *Texas &c. R. R. Co.* v. *Miller,* 221 U. S. 408, 414, 415. *And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. Chicago, Burlington &c. Railroad* v. *Chicago,* 166 U. S. 226, 255; *New Orleans Gas Co.* v. *Drainage Commissioners,* 197 U. S. 453, 462; *C., B. & Q. Ry.* v. *Drainage Commissioners,* 200 U. S. 561, 591, 592.

Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.

The ordinances now in question must be considered in view not only of the charter and property rights of plaintiff in error, but of the actual situation that has developed and now exists in Goldsboro, with the consent and long acquiescence of plaintiff in error and its predecessors in interest. A town of considerable size and importance has grown up along the line of the railroad. The strip of land 130 feet in width, so far as it is not occupied by the railroad tracks, for many years has been and still is used for the ordinary purposes of a street. The Supreme Court of North Carolina found, upon adequate evidence, that it is the main business street of the town, frequently crowded with pedestrians and vehicles; and that the operation of trains along it, notwithstanding the utmost care of the railroad company, tends to obstruct the crossings and is fraught with danger to life and property."

Both the facts and the pronouncement of the Court make that case particularly applicable to the case at bar. Whatever rights the Railroad reserved to itself in the driveway by withholding an outright legal dedication of the land in the driveway, it did and does in fact, both by the contract and by the allowance of open and notorious use of the driveway,

permit the public,—certainly that part of the public having business with the railroad and also that part of the public going in and out of Saw Mill Lane,—to use this driveway for ordinary street purposes.

By so doing the Railroad here, just as the railroad in the *Goldsboro* case, "at least for the time devotes its property in part to public uses that are more or less inconsistent with railroad uses," and so subjects its driveway to the exercise of the police power for the protection of the public.

In *Missouri Pacific Ry.* v. *Omaha,* 235 U. S. 121, the court upheld the right of the municipality acting under the authority of a state statute, to require a railroad to construct overhead crossings or viaducts at its own expense and said (p. 127):

> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. *Chicago, Burlington & Quincy Railway* v. *Drainage Commissioners, supra; McLean* v. *Arkansas,* 211 U. S. 539; *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548."

The court also pointed out (p. 128):

> "That the City of Omaha had power to pass an ordinance of this character in execution of the authority conferred upon it by the legislature of the State, has been determined by the highest court of the State of Nebraska, considering Chapter 12-*a,* § 128, Compiled Statutes of Nebraska, 1911. *State* v. *Union Pacific Railroad Company,* 143 N. W. Rep. 918."

And see

> *Chicago, &c., R. R.* v. *Nebraska,* 170 U. S. 57, page 72.

In *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372, this court said (p. 376):

> "In *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, the court said:
>
> > " 'It is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necesssary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."
>
> "And in *Rail & River Coal Co.* v. *Ohio Industrial Commission*, 236 U. S. 338, 349, the state of the law upon the subject is thus aptly described:
>
> > " 'This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the cases in passing.'
>
> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

In *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228, the company had an operating pipe line from the oil fields to the Pacific Coast, whereby it transported crude oil. The contention was that the pipe line was constructed solely to carry crude oil for particular producers under strictly private contracts, and that there had been no carrying for others, nor any devotion of the pipe line to public use (p. 230). The court found, however, that the pipe line was in fact devoted to a public use, and said (p. 230):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers

under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment. *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 593; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595; *Associated Oil Co.* v. *Railroad Commission,* 176 California, 518, 523, 526. And see *Munn* v. *Illinois,* 94 U. S. 113, 126; *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, 495; *Weems Steamboat Co.* v. *People's Steamboat Co.,* 214 U. S. 345, 357; *Chicago & Northwestern Ry. Co.* v. *Ochs,* 249 U. S. 416, 419-420. On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices and subject to public regulation. *Munn* v. *Illinois, supra.*

"The state court, upon examining the evidence, concluded that the company voluntarily had devoted the pipe line to the use of the public in transporting oil."

In *Block* v. *Hirsh,* 256 U. S. 135, this court said (p. 155):

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance in *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; irrigation, in *Clark* v. *Nash,* 198 U. S. 361; and mining, in *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mt. Vernon-Woodberry Cot-*

ton Duck Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30, 32, *and that the public interest may extend to the use of land.* They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, 111."

We, of course, subscribe to all that this court said in the cases cited in petitioner's brief (pp. 20-22) but the principles enunciated in those cases and quoted in the brief are entirely consistent with the upholding of the ordinance in question here, because of the facts and circumstances in this case which are quite different from those in the cases cited.

Wolff Co. v. *Industrial Court*, 262 U. S. 522 (Petitioner's Brief p. 20), involved the validity of the Court of Industrial Relations Act of Kansas which sought by legislative fiat to declare many strictly private businesses to be clothed with a public interest in the sense that they were subject to regulation under the police power.

Banton v. *Belt Line Ry.*, 268 U. S. 413 (Petitioner's Brief, p. 22), was one of the familiar class of rate cases involving the validity of an order of the New York Public Service Commission establishing joint routes on street railways in New York City and prescribing five cents as the maximum joint fare (p. 415).

Penn. Coal Co. v. *Mahon*, 260 U. S. 393 (Petitioner's Brief, p. 22), involved the validity of a state statute forbidding the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation (p. 412). It appeared that the deed executed by the Coal Company under which the plaintiff's claim provided that the grantee took the premises with the risk and waived all claim for advantages that might arise from mining out the coal. The decision went squarely on the facts and circumstances of the case, this court saying (p. 416):

> "This is a question of degree—and, therefore, cannot be disposed of by general propositions. But we regard this as going beyond any of the decided cases in this court."

(4) Petitioner's argument (pp. 12 to 26) answered.

There is no taking of the Railroad Company's property under the guise of regulation, as argued in Petitioner's brief (p. 12), because of the devotion of the property to public use and because the regulation complained of is within the authority conferred under the contract upon the Town by the Railroad Company with respect to this very driveway, under the Contract.

The cases cited in Petitioner's brief (pp. 12 and 13) are not particularly in point, because in those cases there was no contract between the parties, or any limitation or abdication of its rights, by the Railroad, as is the case here.

Furthermore, the decisions in the cases cited in Petitioner's brief (pp. 12-13) recognized the principle for which we contend, but denied its application to the facts and circumstances of those cases.

In *Great Northern Ry.* v. *Minnesota,* 238 U. S. 340, this court said (p. 345):

> "The applicable principles were announced in *Oregon Railroad, &c. Co.* v. *Fairchild,* 224 U. S. 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, *in view of all the facts,* the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive. *Interstate Commerce Commission* v. *Louis. & Nash. Railroad,* 227 U. S. 88, 91; *Florida East Coast Line* v. *United States,* 234 U. S. 167, 185."

And again in *Great Northern Ry.* v. *Cahill,* 253 U. S. 71, the test was stated to be (p. 72):

> "whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could lawfully be compelled to meet."

Again the effect of the ordinance is not, as argued in Petitioner's brief (pp. 14-23), to enlarge the duties of the Railroad Company so as to include a taxicab service.

As a matter of fact the Railroad has to a certain extent voluntarily enlarged its duties to include a taxi-cab service by the contract it made with Welsh (R. p. 22, 24 B). The Railroad grants special privileges to Welsh in its station, building and grounds and receives in return 10% of "the gross receipts from all business to and from said Morristown Station" (R. p. 25, l. 35).

The ordinance merely regulates traffic in the driveway, in the interests of the public having occasion to use the driveway.

If the effect of the ordinance is, as argued (Petitioner's Brief, p. 14), to require the Petitioner to furnish a specified area of land for the parking of cabs, that effect is incidental and is not the main object or design of the ordinance. The object and design of the ordinance is to protect the health, welfare and safety of those of the public using the driveway (R. p. 28). The taking of which the Petitioner complains may result, but it is not an unconstitutional taking because the driveway both by custom and by the contract has been devoted to a public use and hence is subject to the exercise of the police power.

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548, p. 557.

Nor must it be overlooked that the Railroad Company agreed to such regulation by the Contract with the Town.

It agreed to and did provide the necessary lands and laid out the driveway, and agreed to keep it open for public travel (R. p. 316); and it further agreed that the Town should exercise all necessary police powers over the station grounds and driveways for the purpose of regulating traffic (R. p. 317).

All that the Railroad Company retained for itself under the Contract was the right of reversion in the driveway. It

in effect turned over the use and control of the driveway to the Town. It provided that the legal effect of this turning over should not amount to a dedication in law, so that upon the termination of the contract the title to the land in the driveway would revert unimpaired to the Company.

Petitioner's brief (p. 17) argues that if the police power of the municipality extends to establishing a public hack-stand on a station driveway it would also extend to the establishing of a parcel-room, restaurant or other similar convenience in a railroad station.

The argument fails as applied to this case because it ignores the existence of the contract between the railroad and the Town and the further fact that as the result of that contract the railroad has permitted the public to and from the station to make use of its land to the extent of using the driveway for foot and vehicular traffic, including also those having rights of egress from Saw Mill Lane. Those facts at once distinguish this case from the imaginary one where an effort is made to impose some public convenience on private property without any reason or justification. The facts and circumstances here alter the case entirely.

Any ordinance adopted by the Town under its police power attempting to establish a parcel-room or any such thing as is supposed in the Petitioner's brief would have to stand the test of reasonableness. In the case at bar there is no claim that the ordinance establishing a cab-stand is unreasonable, as the Circuit Court of Appeals pointed out (R. p. 370, l. 26).

This argument as advanced in Petitioner's brief (p. 17) may be dismissed by a reference to what this Court, by Mr. Justice Holmes, said in reply to a similar sort of argument advanced by the plaintiff in error in *Noble State Bank* v. *Haskell*, 219 U. S. 104, at p. 112:

> "It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police

power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355."

There is no foundation in the record for the claim (Petitioner's Brief, p. 21) that the effect of the ordinance is to make the Railroad Company a partner in the taxicab business, and the cases cited have no particular application to the facts here.

It cannot be denied that the Railroad did, to a certain extent at least, turn over its driveway to the use of the public: certainly to that part of the public having business with the Railroad. In a suburban town like Morristown this was a considerable proportion of the population. The bill of complaint says the Railroad handles some 3,000 passengers a day between New York and Morristown alone (R. p. 7). The Railroad gets the benefit of the use of this driveway by those of the public who are its patrons. Having thus granted the use of the driveway to the public, or such portion of the public as have business with the Railroad, it has in effect granted to the public an interest in that use and must submit to the regulation of it by the public (in this case, the Town) for the common good.

Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548.

Petitioner's brief (p. 21) argues that *Munn* v. *Illinois* (*supra*), is inapplicable because the effect of the ordinance is to establish a taxi-cab business which the railroad company has no power to discontinue at its will. It is true, as this Court pointed out in *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, page 541, that the right to discontinue the business when he chooses refutes the view that public regulation in such cases can secure continuity of a business against the owner, but this court, in the same case, also pointed out that while an ordinary producer, manufacturer or shop-keeper might sell or not sell as he likes "this feature does not necessarily exclude businesses from the class clothed with a public interest" (p. 538).

Now in the case at bar the railroad has agreed to the continued use of the driveway. It agreed that the said driveway "shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds," etc. (R. p. 316, l. 30) and by that agreement has obligated itself to keep open this driveway for traffic as long as its land is used for station purposes.

Besides that the railroad, as a common carrier, has assumed the obligation of continued service by the nature of its business and the fact that it has accepted a railroad franchise. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, at page 543.

Petitioner's brief (p. 20) attempts to distinguish the cases from this Court cited by the Circuit Court of Appeals, namely

> *Munn* v. *Illinois,* 94 U. S. 113, at p. 125 and p. 130;
> *Chicago &c. R. R.* v. *Nebraska,* 170 U. S. 57, at p. 72;
> *Union Dry Goods Co.* v. *Georgia, P. S. Corp.,* 248 U. S. 372, at p. 376,

as dealing exclusively with rates or regulations and not involving the use of lands, and says that nothing is said in any of them in support of taking land.

We think the principles laid down in those cases fully rule the case at bar, but if other citations from this Court are needed, see

Block v. *Hirsh,* 256 U. S. 135, which related to a taking of land, namely the cellar and first floor of a building on F Street in Washington (p. 153) and this Court, by Mr. Justice Holmes, said (p. 155),

> "the public interest may extend to the use of land."

Atlantic Coast Line v. *Goldsboro,* 232 U. S. 548, page 558, where the subject matter of the taking was land of the railroad company which, like the land in the driveway here, was used as a street.

Producers Transportation Co. v. *Railroad Commission,* 251 U. S. 228, where the use of a pipe line was involved.

Levy Leasing Co. v. *Siegel*, 258 U. S. 242, where this court cited the following cases, page 247:

> "*Strickley* v. *Highland Boy Gold Mining Co.*, 200 U. S. 527; *Welch* v. *Swasey*, 214 U. S. 91; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531; *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269; *Perley* v. *North Carolina*, 249 U. S. 510."

And then said:

> "These authorities show that from time to time for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases,"

Nor is the ordinance an attempted regulation of transportation on the part of the Town as argued in Petitioner's brief (p. 23).

All that the Town has ever sought to do is to regulate traffic in the driveway in the interest of those of the public having occasion to use it.

It would be stretching the supervision of the Board of Public Utility Commissioners beyond reason to say that a mere regulation of traffic on a station plaza could only be accomplished by order of the Board of Public Utility Commissioners after application to that Board.

There can be no doubt that the driveway has been and is devoted to a public use. It is subject to a public user by those of the public which go to make up the traffic, both pedestrian and vehicular, to and from the station grounds on the easterly side of the railroad since this driveway constitutes the only street approach to the station on that side, and also by those having rights of egress to Morris Street in Saw Mill Lane.

These facts create a situation with respect to the traffic problem which could only be dealt with by the municipality.

And not only so, but the railroad agreed that the Town should regulate traffic in the driveway only reserving to itself

the fee in the land by providing that the contract should not be construed as a dedication of the driveway as a public highway. A dedication in the technical legal sense would have deprived the railroad company of the title to the land, while the reservation of the fee in no way militates against the exercise of necessary police powers in and upon the driveway for the purpose of regulating traffic.

The regulation of the foot and vehicular traffic in the driveway is quite different from a regulation of transportation requiring the intervention of the Board of Public Utility Commissioners.

POINT II.

The Town had the right to pass the ordinance of October 22, 1924, because of the express agreement of the Railroad Company set forth in the contract of 1912.

Petitioner in its brief (Point II, p. 26, etc.) stresses that part of the contract relating to the driveway in question which provides: "this contract shall not be construed as a dedication of said driveway as a public highway," but seeks to refine away those other provisions of the contract which provide that (*a*) a driveway shall always be kept open for foot and vehicular traffic and that (*b*) the Town is impowered to exercise all necessary police powers in and upon the station grounds to regulate traffic.

In addition to the power which the Town has under its police powers, as a municipal corporation, to pass the ordinance in question growing out of the permitted public user of this driveway, the Town was specifically granted authority by the Railroad Companies to do the very thing the Petitioner now claims it cannot do.

The contract provided for the elevation of the Railroad Company's tracks. This involved the vacating of existing

streets, and the laying out of other streets, some on land to be furnished by the Railroad Company and some on land to be furnished by the Town.

See Paragraph VI, captioned "New Street" in the contract (R. p. 315).

In the contract it was agreed that the Town should lay out and construct a new street running along the easterly elevation wall for a distance of approximately 350 feet; and that the Railroad Company should dedicate lands owned by them, necessary for the laying out of such new street; and that the Town should at its own expense acquire all other lands necessary. It is also provided that the Railroad Company should lay out the driveway which should connect with this new street and run along the easterly elevation wall and thence at right angles under the tracks to Morris Street, and should provide all lands necessary for laying out and establishing said driveway, and that (R. p. 316, l. 28)

> "Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles, and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway."

In Paragraph VII of the contract, captioned "Passenger Station", it was agreed as follows (R. p. 317, l. 15):

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

Grant that the fee in the land remained in the Railroad. Grant also, the Railroad never dedicated the land in the driveway in the strict legal sense of the word "dedicate".

Nevertheless the contract by its very terms provides that the Town should exercise all necessary police powers in and upon the station, station grounds, approaches, and driveways, for the purpose of regulating foot and vehicular traffic at the station. It is not necessary to go into the question of the true construction of the words "and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto". There are no such "rules and regulations" before the court. An effort to introduce as evidence rules and regulations made after the filing of the bill, was properly overruled (R. p. 139, l. 23 to p. 143, l. 15).

It will be noticed that the parties agreed that the Town should exercise all necessary police powers over the entire station grounds, including the driveways, for the purpose (1) of regulating the foot and vehicular traffic at the station; and (2) for the enforcement of the rules and regulations of the Railroad Companies in respect thereto. These two sets of duties are not mutually exclusive; they are connected by the conjunctive "and". The Town is given authority to make use of its police powers to regulate the traffic according to its own notion on this otherwise private property, *and* it is also given authority to use its police powers to enforce any rules and regulations of the Railroad with respect thereto. Now the Railroad never made any rules or regulations with respect thereto. There is no proof of any such rules or regulations whatever, in the Record sent up.

But the existence or non-existence of rules and regulations by the Railroad, does not affect one way or the other under the contract, the power and authority of the Town to regulate the foot and vehicular traffic at the station through the exercise of its police powers.

And it is significant that no limitation whatever is placed on the authority of the Town over the Station, station grounds, approaches and driveways in the exercise of the authority conferred on it by the contract. The authority is conferred on the Town in the most sweeping manner; the language is "the Town may and shall exercise all necessary police powers".

And what may the Town do in the exercise of its police powers on these station grounds and driveways? It may regulate foot and vehicular traffic at said station: how? Necessarily in such manner as its good judgment dictates. Granting all that petitioner's brief contends for with respect to the claim that the property is private property, and that the Railroad Company never dedicated it, in the legal sense of the term "dedicate", nevertheless, the fact remains that the Railroad by the terms of Article VII of the contract voluntarily abdicated its full powers of enjoyment over its property to the extent of consenting that the driveway should always be kept open for traffic and to the further extent of conferring upon the Town the right, in the exercise of its police powers, to regulate foot and vehicular traffic on the station grounds and driveways.

These provisions of the contract cannot be ignored. They are a part of the agreement between the Railroad and the Town and must be given their proper weight in determining the rights of the parties in this driveway.

The Circuit Court of Appeals correctly construed the language of Paragraph VII (R. p. 317) of the Contract when it said (R. p. 371, l. 30):

> "This provision authorized the town to do two things: To regulate foot and vehicular traffic about the station, station grounds, approaches and driveways; and to enforce the rules and regulations of the railroad company in respect to the traffic. In performing the first duty, the town was to make its own rules and laws in accordance with which it would regulate the traffic. In doing the second, it was simply to enforce the rules and regulations made by the company. But the town had the power to make rules and regulations independently of the contract. As Mr. Justice Trenchard said in his able opinion in the case of *Welsh* v. *Morristown, supra:* 'The town had authority not only by virtue of its police powers but by express grant from the railroad company, owning the fee, to regulate traffic thereon.' "

Petitioner's brief (p. 34) argues for an interpretation of the words "police Powers" in Article VII of the contract

which is unwarranted either by the context or when considered in connection with other provisions of the contract.

(*a*) The Railroad agreed to keep the driveway open at all times for traffic.

The location of the driveway right at the station necessarily meant, as is the fact, that there would be a great deal of traffic on it.

The presence of a volume of traffic at any congested center under modern conditions in our cities implies the necessity of some regulation of that traffic.

If nothing further had been said in the contract about regulation of traffic the right to regulate might fairly have been implied from the simple fact that this driveway was, by consent of the Railroad, opened for the traffic which necessarily at times crowded in and out of the station (R. p. 7, l. 10). But the parties to the contract did not rest on any implications. They went further.

(*b*) The Railroad specifically agreed that the Town should regulate the traffic in the driveway. Petitioner's brief (p. 34) concedes that the Town had some kind of power by the agreement to regulate the foot and vehicular traffic at the station, but argues that the obligation was that of maintaining police officers at the station to regulate the traffic in accordance with the rules and regulations of the railroad company. –

This interpretation is obviously too narrow, and does not give full effect to the contract.

(1) The Railroad, over a period of over ten years, never made any rules and regulations. It would be absurd to say that under the contract the Town had no authority whatever to regulate the traffic on the driveway until the Railroad had made some rules and regulations with respect thereto to be enforced by the Town.

(2) The limitation of the words "police powers" to the mere stationing of police officers upon the property does vio-

lence to the language of the contract and evident intent of the parties.

If it had been intended that the regulation by the Town should be limited to the stationing of police officers on the ground it would have been a simple matter to have said so in the contract, and in that case the contract would have read:

> "It is further agreed that the Town *may station police officers* in and upon the station, station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station."

But the contract used no such language. It used language which is much broader in its scope and intent than that. It used the word "exercise" and the words "all necessary" as bearing on the construction of the words "police powers" and provided that the Town may and shall "exercise all necessary police powers in and upon the station," etc.

It is a strained construction to limit the words as argued for in petitioner's brief. When the Railroad agreed that the Town should exercise all necessary police powers in and upon the station it did more than grant a mere permit to the Town to station a police officer on the station grounds. It may be that the Town would be exercising its police powers when it stationed an officer on the station grounds to direct the traffic but that would not be the limit of its exercise of its police powers under the language of the contract.

The term, "police powers," as applied to a municipality is well understood. A municipality may exercise its police power in a variety of ways depending on the circumstances of a given case. Here the Railroad agreed that the Town should exercise its police powers without limit for the regulation of traffic in and upon the station grounds, for it agreed that the Town should "exercise all necessary police powers" and the words "all necessary" very evidently enlarge the right of the Town to use its police powers in such manner and to such extent as was necessary in its judgment to regulate the foot and vehicular traffic at the station. This might be by station-

ing a policeman on the grounds; it might be by providing that the traffic should enter at one point and depart at another; it might be by requiring the public cabs to stand at one place or another in the driveway; it might be by a variety of ways depending on the particular traffic problem under the circumstances prevailing at the station.

The Railroad by its agreement empowered the Town to regulate the traffic at the station in its own way through the exercise of its police powers; and it also provided that it should also exercise its police powers for the enforcement of any rules and regulations of the Railroad Company with respect to the station grounds and the traffic there, if the Railroad ever formulated any such rules and regulations.

The highest court of New Jersey affirming the State Supreme Court in the certiorari case of *Welsh* v. *Morristown*, 98 N. J. L. 630; 99 N. J. L. 528, had before it for construction this same Contract. The claim in that case, as in the case at bar, was that the ordinance there under review deprived the prosecutor of his property without due process of law and took his property for public use without compensation (98 N. J. L., p. 631). The court, after considering practically the same set of facts as is now before this court with respect to the use of the driveway, and also the language of the contract above quoted, reached the conclusion (1) that the driveway in question was and is devoted to public use, although the fee thereof remained in the Railroad Company, and (2) that the contract fully empowered the Town to regulate the traffic on the driveway. The court said (p. 632):

> "This track elevation contract also contains this broad and significant language: 'It is further agreed that the town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the railroad companies in respect thereto.'
>
> In our opinion that is a plain declaration that the foot and vehicular traffic at the station and in the station driveways is to be regulated by the town."

The court said further (p. 633):

> "There can be no doubt that the town has power by ordinance to regulate traffic when reasonably necessary for public safety and good order. * * *
>
> "As we have pointed out, the public generally had the right to use the driveway in question, and the town had authority, not only by virtue of its police power, but by express grant from the railroad company owning the fee, to regulate traffic thereon. The town had power to enact the ordinance, even though the company, before the passage thereof, had granted to the prosecutor, a taxicab man, the exclusive right to solicit business on its station grounds, and the exclusive privilege of parking vehicles at the place in question. Such ordinances (no question of lack of notice to the prosecutor being raised) does not deprive the prosecutor of his property without due process of law, nor take his property for public use without just compensation, nor deny him the equal protection of the laws."

The case of *Thompson's Express Co.* v. *Mount*, 91 N. J. Eq. 497, cited in Petitioner's Brief (p. 17), is not only not in point, but was, as we have shown, distinguished by the same Court in its later decision in *Welsh* v. *Morristown* (*supra*).

The language of the contract must be read in the light of the conditions which it was designed to meet. Consideration must therefore be given to the fact that the place in question was a place frequented by the public, namely, an approach to a railroad station, that traffic of a public character, namely, public cabs, would make use of the driveway, bringing passengers to and taking away passengers from the station, and that passengers coming in their own cars would make use of this driveway, as well as those having rights of egress to Morris street in Saw Mill Lane; so that when the agreement provided that the Town should exercise all necessary police powers for the purpose of regulating foot and vehicular traffic at the station, it must have been in the contemplation of the parties that the creation of a hackstand

or parking place at the station might very properly be a part of the regulation of the foot and vehicular traffic which would necessarily accumulate there.

Any other view would be a narrow and restricted one which would not give full effect to the evident intention of the parties at the time the contract was made.

A hackstand had been established by Mayor Todd in the driveway along the easterly elevation wall at the place indicated on the map annexed to the bill, which continued from the time of the completion of the elevation until it was abolished by the ordinance of November 7, 1923, which was enacted after the present series of litigations began. That ordinance, which abolished the hackstand, was attacked by Welsh who tried to prevent the removal of the hackstand from that place.

The ordinance of October 22, 1924 (Exhibit C to the bill, R. p. 28) is now attacked in this suit, although it re-establishes the hackstand at the same place in the driveway where the previous hackstand had been along the easterly side of the elevation wall and gives to Welsh in common with the other hack drivers of Morristown the equal right to park his cabs there.

Petitioner's argument (Point II, p. 26) seeks to escape the salient point that the Railroad Company, by the contract of September 24, 1912, specifically agreed that the Town should exercise all necessary police powers in and upon the station grounds, approaches and driveways for the purpose of regulating foot and vehicular traffic at the station.

The situation here is quite different from that where roadbed, or right-of-way of a railroad company are involved.

Cases may be cited to establish the right of a railroad company to fence off or exclude persons from its roadbed or right-of-way, but they are not in point.

The ordinary right of a railroad company to fence in its roadbed has no application here. The Railroad specifically agreed with the Town, not only not to fence off this driveway and hence exclude persons from using it, but to keep

it open at all times as a driveway not only for passengers and vehicles to and from the station grounds, but also for the use of those having rights of egress to Morris street in Saw Mill Lane. This Railroad also agreed that the Town should "exercise all necessary police powers" in and upon this driveway. The Railroad's own agreement precludes the contention now made that the Town should not exercise police powers upon this driveway.

(a) The establishment of a parking place by the ordinance of October 22, 1924 (R. p. 28), is within the terms of the contract in that it constitutes a regulation of foot and vehicular traffic at the station.

The contract (R. p. 317, l. 15) as we have seen specifically provided that the Town should exercise all necessary police powers in and upon the station and station grounds, approaches and driveway, for the purpose of regulating foot and vehicular traffic at the said station.

In order to have a public cab available to persons desiring the service of a cab, there must necessarily be established some place where a cab can conveniently be found. It could not reasonably be expected that public cabs should continuously drive up and down the driveway, waiting for some passenger to hail one of them or that the passenger should be expected to stand out looking for a moving cab which he could hail.

See

Masterson v. *Short*, 30 N. Y. Super. Ct. 241; 3 Abb. Prac. Ch. S. 154;

The Taxicab Cases, 143 N. Y. Supp. 279, at p. 293;

Waldorf-Astoria Hotel Co. v. *City of New York*, 105 N. E. Rep. (N. Y.) 803, at p. 806.

Now, while the cab stand created by the ordinance of October 22, 1924, is not on a dedicated public street, it is on

the driveway in question, and this is on land which is devoted to a public use, both by customary use and under the terms of the Elevation Contract, and the reasoning of the foregoing cases fully applies.

The business of driving a public cab is a business devoted to public use. So held in *Munn* v. *Illinois, supra.*

The Taxicab Cases, supra, page 289;
Wolff Co. v. *Industrial Court,* 262 U. S. 522, at p. 535.

(b) The parties to the suit, namely, the Railroad Company and the Town, by their conduct over a period of ten years practically have construed the contract to empower the Town to establish a parking place on the driveway in question.

Following the completion of the improvement under the elevation contract, Mayor Todd established a parking place on the driveway at the same place where the ordinance of October 22, 1924 (R. p. 29, ll. 13 to 21), now places it, and issued instructions to the police to enforce the regulation, and it was enforced (see testimony of John Todd, R. pp. 37 to 39).

The cab stand thus created and enforced continued for some ten years and the Town regulated the traffic, including the maintenance of this parking place for public cabs, without any objection or complaint from the Railroad Company and this is admitted in Petitioner's Brief (p. 24). On the contrary, when the Town did abolish it by the ordinance of November 7, 1923, the ordinance was attacked in the name of Welsh. See *Welsh* v. *Morristown,* 98 N. J. Law, 630. It can hardly be said this action was displeasing to the Railroad Company, since its Attorney, Mr. Stallman, appeared for Welsh in that case.

The fact that for some ten years following the completion of the improvement, and until the present controversy began, a parking place for taxicabs had by regulation of the Town existed at the very place where the taxicab stand cre-

ated by the ordinance of October 22, 1924, now is, and that this existed to the knowledge of the Railroad Company, and without any objection on its part, constitutes a most important piece of conduct evidence as showing the practical construction which the parties gave to the contract.

In *Van Dyke* v. *Anderson,* 83 N. J. Eq. 568, the Court said (p. 570):

> "Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves place upon it, and as to which they deal with each other, is, as between them, the one to be adopted and to be given by the Courts."

The courts recognize as a distinct doctrine, apart from the doctrine of laches, the doctrine of conduct evidence as precluding a party from later asserting a claim.

See:

Dennis v. *Jones,* 44 N. J. Eq. 513;
Clampitt v. *Doyle,* 73 N. J. Eq. 678;
Faulkner v. *Wassmer,* 77 N. J. Eq. 537, at p. 542.

In *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, this Court by Mr. Justice Holmes said (p. 366):

> "* * * the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic."

Conclusion.

The Circuit Court of Appeals in its opinion (R. p. 365) fully recognized the right of private property to full protection under the Constitution (R. p. 368), but it also recognized that property devoted to a public use is subject to reasonable regulation by the State under the police power (R. p. 369). It properly applied these well established rules of law to the facts of this case, and held, as succinctly stated in the 8th head note to the opinion (14 Fed. 2nd, p. 257):

> "Where railroad company by contract had authorized town to exercise necessary police powers for regulating foot and vehicular traffic at station, town was authorized to enact ordinance establishing cab stand, not only under such contract, but also by reason of fact that railroad company, by devoting its property to public use, had affected it with public interest."

The dissenting opinion by Judge Buffington overlooks two pertinent facts: (1) that notwithstanding the reservation of the fee in the land, the Railroad has opened the driveway to public use and has agreed that it shall always remain open as a driveway; and (2) that the Railroad agreed that the Town should exercise all necessary police powers in and upon the station, station grounds and driveways for the purpose of regulating the traffic, and that the ordinance was passed by the Town in the interests of the public welfare as a regulation of traffic.

We respectfully submit that for the reasons herein stated the judgment of the Circuit Court of Appeals should be sustained.

CONOVER ENGLISH,
N. C. TOMS,
Counsel for Respondent,
The Town of Morristown.

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SUPREME COURT OF THE UNITED STATES.

No. 147.—October Term, 1927.

The Delaware, Lackawanna and Western Railroad Company, Petitioner, *vs.* The Town of Morristown, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 20, 1928.]

Mr. Justice Butler delivered the opinion of the Court.

October 30, 1924, petitioner brought this suit in the district court for New Jersey against the Town of Morristown and sixteen operators of taxicabs to restrain the town from enforcing an ordinance establishing a public hackstand in a driveway on petitioner's station grounds, to prevent the use of its land for parking of taxicabs and other vehicles and to restrain the individual defendants from going on its premises to solicit patronage and from using its grounds as a hackstand.

The Morris and Essex Railroad Company owns the railroad and petitioner operates it as lessee in perpetuity. September 24, 1912, an agreement was made between the town and the companies providing for the elevation of the tracks in order to eliminate certain grade crossings. The agreement was fully performed. The tracks run north and south through station grounds of somewhat irregular shape containing about four acres. The main station building is on the west side of the tracks and on the east side there is a platform roofed over, called the shelter house. The town agreed to lay out and construct a new street extending to the station grounds on the east side of the tracks. The companies agreed to "dedicate any lands owned by them necessary for the laying out of such new street." Petitioner constructed and maintains driveways within its grounds, one of which passes under the tracks along the north boundary and thence south parallel to the tracks and near the east side of the shelter house to the south boundary of the grounds where it connects with the new street. It was agreed that: "Said driveway shall be kept open at all times for pas-

sengers, pedestrians . . . and . . . vehicular traffic to and from the station grounds on the easterly side of said Railroad and for the use of those now having rights of egress to Morris Street in Saw Mill Lane, but this contract shall not be construed as a dedication of said driveway as a public highway." It was further agreed "that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

Passengers arriving on trains from New York get off on the east side and leave the station grounds by the driveway described. Prior to 1922, operators of taxicabs were accustomed to drive into the grounds to meet these trains and there solicit patronage. It is a matter of common knowledge that such competition for the transportation of passengers and their baggage from railway stations is liable, if not indeed certain, to be attended by crowding together of cabmen, confusion, noisy solicitations, importunities and contentions resulting to the annoyance and disadvantage of those sought to be served.* And the record shows that these or similar abuses prevailed or were liable to occur at the Morristown station. December 28, 1922, petitioner made an agreement with one Welsh in which it was stated that petitioner desired to establish adequate cab service for the accommodation of its passengers and to regulate the solicitation of business in its station and upon its station grounds and the parking of vehicles there. It granted to him the privilege, under the control of petitioner's manager, to solicit business as a cabman in the station and on its grounds, to have a stand and telephone facilities in the station and to park his vehicles upon a specified space in the driveway east of the shelter house. Welsh agreed to have a sufficient number of vehicles, to maintain them at the highest standard of efficiency and to give satisfactory service at specified rates which should "in no wise exceed the rates now or

*Donovan *v.* Pennsylvania Company, 199 U. S. 279, 295; Commonwealth *v.* Power, 7 Metc. 596; Napman *v.* The People, 19 Mich. 352, 356; Dingman *v.* Duluth, etc. R. Co., 164 Mich. 328, 330-331; Hedding *v.* Gallagher, 72 N. H. 377, 395; Thompson's Co. *v.* Whitemore, 88 N. J. E. 535, 536; Railroad *v.* Kohler, 107 Kan. 673, 677; Brown *v.* Railroad Co., 75 Hun. 355, 362; Rose *v.* Public Service Commission, 75 W. Va. 1, 6; New York, N. H. & H. R. Co. *v.* Scovill, 71 Conn. 136, 137, 148; Landrigan *v.* State, 31 Ark. 50; Union Depot & Ry. Co. *v.* Meeking, 42 Colo. 89, 97.

hereafter prescribed by municipal ordinance." Then, on February 7, 1923, the municipal authorities, conceiving that this agreement created a monopoly and was unjust to other taxicabmen, adopted an ordinance prohibiting the standing of automobiles upon the space set aside for Welsh for "a longer time than is necessary to take on and let off passengers, expressage or baggage", and prohibiting such standing of vehicles on any other part of the driveway. In a suit brought by Welsh against the town the State Supreme Court held this ordinance to be a valid regulation of traffic under general power of the town and under the track elevation agreement. 98 N. J. L. 630, affirmed by the Court of Errors and Appeals *sub nomine Welsh* v. *Potts,* 99 N. J. L. 528. Upon the termination of that litigation, the town, October 22, 1924, passed the ordinance here in question. It declares a space including that set aside by the petitioner for the use of Welsh's vehicles to be "an additional public hackstand" and prohibits the parking of vehicles in other parts of the driveway. Immediately upon the passage of this ordinance, the individual defendants entered the station grounds, parked their vehicles upon the space so designated and solicited patronage.

The petitioner brought this suit claiming that the enforcement of the ordinance would take its property for municipal purposes without due process of law in contravention of the Fourteenth Amendment. In defense the respondents maintain that the establishment of the public hack stand does not amount to a taking of petitioner's property but is a mere traffic regulation that the town is authorized to make under the track elevation agreement and also by the exertion of its police power.

After trial, the district court entered its final decree declaring the ordinance repugnant to the Fourteenth Amendment and restraining the town from taking the company's land for a public hack stand and preventing it from interfering with the company's use of its premises or control of vehicles thereon and commanding the individual defendants to refrain from parking vehicles or soliciting patronage on the station grounds. The Circuit Court of Appeals reversed the decree and directed the district court to dismiss the case. 14 F. (2d) 257. This Court granted a writ of certiorari. 273 U. S. 686.

The Circuit Court of Appeals held that the track elevation agreement authorized the town to establish a public hack stand on the

driveway in the station grounds. The principal purpose of that agreement was to eliminate grade crossings; regulation of traffic to and from the station was incidental. The town has not acquired by purchase or eminent domain any part of petitioner's land or the right to establish a public hack stand there. It is not claimed that the agreement expressly authorizes the town to make such an appropriation of petitioner's land. And there is nothing from which such a grant may be implied. The intention of the parties is plainly expressed. There is an express dedication by the companies of their lands within the new street opened by the town outside the station grounds. But, there being no such purpose in respect of land within the grounds, the agreement declares "this contract shall not be construed as a dedication of said driveway as a public highway." There is no room for construction. And, even in the absence of that clause, the facts disclosed by the record are not sufficient to raise a presumption of dedication. *Wood* v. *Hurd*, 34 N. J. L. 87.

While petitioner owed its passengers the duty of providing a suitable way for them to reach and leave its station, it was not bound to allow cabmen or others to enter upon or use any part of its buildings or grounds to wait for fares or to solicit patronage. *Donovan* v. *Pennsylvania Company*, 199 U. S. 279, 295. *Thompson's Express Co.* v. *Mount*, 91 N. J. E. 497. Its agreement to keep the driveway "open for traffic to and from the station" did not add to its obligations or enlarge the powers of the town. Respondents put much reliance upon the clause providing that the town "may and shall exercise all necessary police powers" in and upon the station grounds "for the purpose of regulating traffic" at the station and for the enforcement of petitioner's rules and regulations in respect thereto. But it is to be borne in mind that the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed. *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540, 569. Lewis on Eminent Domain (3rd ed.), § 371. *Inhabitants of Springfield* v. *Connecticut River Railroad Co.*, 4 Cush. 63, 69-72. *Holyoke Company* v. *Lyman*, 15 Wall. 500, 507. Cf. *Richmond* v. *Southern Bell Telephone Co.*, 174 U. S. 761, 777. The provision relied on is merely petitioner's authorization and the town's agreement that the municipal power of police shall be exerted for the purpose of regulating, and to carry into effect petitioner's rules in respect of,

the traffic at the station. The agreement does not empower the town so to appropriate petitioner's land.

Is the provision of the ordinance of October 22, 1924, declaring a part of the driveway to be a public hack stand a valid exercise of the police power? We assume that by the laws of the State the town is authorized to regulate traffic and to establish public hack stands in its streets and other public places. It does not claim the power to take or appropriate private property for such a purpose without giving the owner just compensation, but it contends that the establishing of this hack stand "was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway" and that it does not take private property for public use without compensation "because the lands taken are devoted to a public use." But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, 416. The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment. *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 396, *et seq. Smyth* v. *Ames,* 169 U. S. 466, 523, 526. *Western Union Tel. Co.* v. *Penna. R. R., supra,* 571. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228. *Michigan Commission* v. *Duke,* 266 U. S. 570, 577-578.

As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for

patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner as an incident of its ownership and in order to make profit for itself has a right to use or permit others to use such land for any lawful purpose. *Donovan* v. *Pennsylvania Company, supra,* 294.

There was no duty upon petitioner to accord to other taxicabmen the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business. Petitioner had no contract relations with taxicabmen other than Welsh and owed them no duty because they did not have any business with it. The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others. As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner's private property and could not be so appropriated in whole or in part except upon the payment of compensation.

Under the guise of regulation, the town cannot require any part of the driveway to be used in a service that petitioner is under no duty to furnish. And, as petitioner's duty here involved is confined to the business of carrying passengers by railroad, the declaration of the ordinance that the specified part of the driveway "is hereby designated and established as an additional public hack stand" clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked. *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 346. *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71.

The decree of the Circuit Court of Appeals is reversed, and the decree of the district court is affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 147.—October Term, 1927.

The Delaware, Lackawanna and Western Railroad Company, Petitioner, *vs.* The Town of Morristown, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 20, 1928.]

Mr. Justice Brandeis, concurring in part.

I agree that the decree of the Circuit Court of Appeals, directing a dismissal of the Railroad's bill, should be reversed. But I think that the decree of the District Court requires serious modification. That decree ordered among other things, "that the Town of Morristown, do desist and refrain, and is hereby forever restrained and enjoined, by the attempted enforcement of said ordinance or otherwise, from in any manner interfering with or hindering or obstructing the complainant, the Delaware, Lackawanna & Western Railroad Company, in the occupation, use or control of its said station grounds, or in regulating the place, manner or time in which public or private vehicles going to and from said station grounds shall enter, stand or wait thereon or depart from the same." This part of the decree is, in my opinion, inconsistent with the terms of the contract between the Railroad and the town, with the decision of the highest court of the State construing the same, *Welsh* v. *Morristown*, 98 N. J. L. 630, affirmed sub nom. *Welsh* v. *Potts*, 99 N. J. L. 528, and with the general law of New Jersey. It seems to me inconsistent, also, with the law concerning the obligations of railroads as heretofore declared by this Court.

The situation which confronted the town authorities was this: About 3,000 passengers are handled in and out of the station each day. Continuously, for nearly ten years after the elimination of the grade crossings, cabs had, under the direction of the town authorities and with the acquiescence of the Railroad, parked at

the place later assigned by the ordinance here in question. Then, in 1922, arose the controversy which gave rise to the *Welsh* case and to the case at bar. The bulk of the traffic passing through the station is composed of persons commuting to Newark and New York. Accordingly, the demand for taxicabs at the station is largely concentrated in the late afternoon hours. There are forty-two licensed cabs in Morristown. About twenty-five of them were accustomed to park at the station, at various times of the day. Presumably most of them were available for service at the rush hour in the late afternoon. Welsh, for whom the Railroad asserts the exclusive privilege of using the driveway as a hack stand, has only three licensed cabs. Obviously, these are insufficient to give an adequate service. It is true that Welsh made application for additional licenses, and that these have been denied by the town authorities. But the testimony shows that the authorities were of the opinion that there were already more taxicabs in the town than could be operated profitably. No new license had been granted to any one since a date preceding Welsh's application; and no cabman had a license to operate more than three cabs.

The Railroad presented this alternative to the town: "Either grant to Welsh licenses sufficient in number to enable him to supply the needs of all passengers arriving at the station, or submit to a denial to such passengers of the facilities customary on leaving the station." To escape from that dilemma the town first resorted to the means upheld by the New Jersey courts in the *Welsh* case. It prohibited all parking on the driveway, and located a public taxi-stand on a public street adjacent thereto. While this provided a service adequate so far as the number of vehicles was concerned, it proved unsatisfactory in other respects. The taxi-stand was several hundred feet distant from the shelter house; was not easily visible therefrom; and was difficult of access in inclement weather. The town then passed the ordinance which gave rise to the present suit. It undertook to establish near the station door a public taxi-stand on the Railroad's land. That it clearly had no right to do; for the contract between it and the Railroad had not made the driveway a public street. Obviously a railroad's property cannot be taken without compensation for a purpose unconnected with its rail transportation. *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340, 346; *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71. A public taxi-stand is such an unconnected purpose.

It would be open to use by cabs which do not serve the patrons of the Railroad, as well as those which do. In establishing this public taxi-stand, the town exceeded its powers. Enforcement of this ordinance was properly enjoined. And since the individual defendants must base their claims on the ordinance, the injunction against them also was proper. Compare *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279; *Thompson's Express & Storage Co.* v. *Mount*, 91 N. J. Eq. 497.

But the injunction granted by the District Court was so broad as to prevent the town from making, by future ordinance, provisions which it may deem necessary to assure to its inhabitants adequate cab facilities. While the contract between the town and the Railroad did not make the driveway a public highway, it did not restrict rights which the town would otherwise have had under the New Jersey law and under decisions of this Court. Under the New Jersey law the Railroad was bound to keep the driveway open to all persons seeking access to and from the station on legitimate business. It could not obstruct the driveway by physical enclosure. *Public Service Ry. Co.* v. *Weehawken*, 94 N. J. Eq. 88, 92. It could not, by its private contract with Welsh, interfere with the power of the municipality to make appropriate regulations as to traffic there. *Welsh* v. *Morristown, supra.* For as the New Jersey court said, "the driveway in question was and is devoted to public use, although the fee thereof remained in the railroad company." Like all property of a carrier by railroad, the driveway was subject to the power of the State to compel the provision of adequate facilities incident to the rail transportation.

In these days, the ability of the traveller to obtain conveniently, upon reaching the street door of the station, a taxicab to convey him and his hand-baggage to his ultimate destination, is an essential of adequate rail transportation. The duties of a rail carrier are not necessarily limited to transporting freight and passengers to and from its stations. It must, in connection with its stations, provide adequately for ingress and for egress. And if it does not itself provide the facilities essential for the convenient removal of freight and passengers from the station, it may be required to let others provide them. That a railroad's obligations may be extended beyond its rails, is settled by numerous decisions of this Court. *Atlantic Coast Line R. R. Co.* v. *Corporation Commission*, 206 U. S. 1, 21-22; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U. S.

334; *Michigan Central R. R. Co.* v. *Railroad Commission*, 236 U. S. 615; *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416; Lake *Erie & Western R. R. Co. v. Public Utilities Commission*, 249 U. S. 422. A State may require a railroad to construct stations. *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53. It may compel the building of a crossing for the convenience of shippers in removing freight. *Norfolk & Western Ry. Co.* v. *Public Service Commission*, 265 U. S. 70, 74. Its power to require adequate provision for carrying passengers to their ultimate destination rests on the same basis. Compare *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21, 26.

The Lackawanna Railroad recognized the importance of proper cab service. It undertook to provide it by the contract with Welsh. But Welsh was in no position to furnish adequate service. He had only three licensed cabs. The Railroad answers that Welsh agreed by his contract with it to supply as many cabs as were needed and that, but for the refusal of the town to grant him more licenses, he would have supplied the requisite number. The town was not obliged to issue additional licenses to Welsh. Its refusal to do so was not arbitrary or unreasonable. The ground of its refusal was that the granting of additional licenses would ruin the business of the established cabmen who had long been engaged in serving its inhabitants, and thus would impair the cab service of the general public throughout the town. The principle on which the town acted is one that is general in motor vehicle regulation today.[1] It

[1]In at least nine states the commission charged with the duty of licensing bus operators is specifically directed to consider the transportation service already furnished and the effect which the proposed service would have upon it, Colorado, Compiled Laws, 1921, § 2946; Kansas, Laws, 1925, c. 206, § 4; Kentucky, Acts, 1926, c. 112, § 4; Montana, Laws, 1923, c. 154, § 4; North Dakota, Laws, 1925, c. 91, §§ 4, 5, 8; Ohio, Page's Code, 1926, § 614-87; South Dakota, Laws, 1925, c. 224, § 3; West Virginia, Barnes' Code, 1925, c. 43, § 82; Wyoming, Compiled Statutes, 1920, § 5497. The principle of safeguarding established, adequate facilities, is applied by commissions in passing upon applications for certificates of convenience and necessity, and by courts in reviewing their orders, although there is not a specific direction in the statute. In the following cases the orders of commissions granting certificates of convenience and necessity were set aside on the ground that it did not sufficiently appear that existing facilities were inadequate: West Suburban Transportation Co. v. Chicago & West Towns Ry. Co., 309 Ill. 87; Choate v. Commerce Commission, 309 Ill. 248; Superior Motor Bus Co. v. Community Motor Bus Co., 320 Ill. 175; Cooper v. McWil-

is one that has been approved by this Court. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277; *Interstate Busses Corp.* v. *Holyoke Street Ry. Co.*, 273 U. S. 45, 52. Compare *Packard* v. *Banton*, 264 U. S. 140, 145; *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 599-600.

The record shows that the service which Welsh can furnish is inadequate, that to grant him sufficient licenses to enable him to furnish such service would impair taxi service throughout the town, and that a taxi-stand located elsewhere than on the driveway does not satisfy the needs of travellers leaving the station. If, under these circumstances, the town should pass an ordinance establishing, on the driveway, a taxi-stand available only to incoming passengers, I see no reason why, under the contract between it and the Railroad or under the general laws of New Jersey, it may not do so. Certainly *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, presents no obstacle. For in that case, the Court expressly left open the question whether the State, to secure adequate service, might require what the cabmen there asserted of their own right. P. 298. Compare *Norfolk & Western Ry. Co.* v. *Public Service Commission, supra.*

Moreover, the decree is subject to another infirmity. By its broad language, it restrains the town from making and enforcing reasonable traffic regulations applicable to the driveway. In so doing it conflicts with both the terms of the contract and the decision of the New Jersey courts in the *Welsh* case. The contract between the Railroad and the town expressly declares

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liams & Robinson, 298 S. W. 961 (Ky.); Cincinnati Traction Co. v. Public Utilities Commission, 112 Ohio St. 699; East End Traction Co. v. Public Utilities Commission, 115 Ohio St. 119; Columbus Ry., Power & Light Co. v. Public Utilities Commission, 116 Ohio St. 36; Chicago, Rock Island & Pacific Ry. Co. v. State, 123 Okla. 190. In Red Star Transportation Co. v. Red Dot Coach Lines, 220 Ky. 424; McClain v. Public Utilities Commission, 110 Ohio St. 1; and Abbott v. Public Utilities Commission, 136 Atl. 490 (R. I.), orders denying certificates were sustained, on the ground that the proposed operation would have impaired adequate transportation facilities already established. The same principles apply with regard to municipal regulation of jitney busses. Cloe v. State, 209 Ala. 544, 545-546; Birmingham Interurban Taxicab Service Corp. v. McLendon, 210 Ala. 525; State v. City of Spokane, 109 Wash. 360. That a railroad has no preferred claim to the grant of a certificate, see Northern Pacific Ry. Co. v. Department of Public Works, 256 Pac. 333 (Wash.). Compare Baltimore & Ohio R. R. Co. v. State Road Commission, 139 S. E. 744 (W. Va.).

that the driveway "shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds"; and that "the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic." It was decided in *Welsh* v. *Morristown*, 98 N. J. L. 630, affirmed sub nom. *Welsh* v. *Potts*, 99 N. J. L. 528, that under this contract the town had power to prohibit all parking on the driveway. That construction, being a ruling on a matter of law, is binding upon us. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners*, 168 U. S. 349, 358; *Guffey* v. *Smith*, 237 U. S. 101, 112-113. Compare *Detroit* v. *Osborne*, 135 U. S. 492, 497-500; *Hartford Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100.

Mr. Justice HOLMES concurs in this opinion.